No. 247

Office - Supreme Court,
FILED
SEP 16 1953
HAROLD B. WILLEY, C

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO,

Appellants.

APPENDIX TO APPELLANTS' BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES COURT
FILED
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19
1953
A.M. BELL CLE
SECOND CIRC

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

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Docket Entries

1

Crim. No. C 135/100

———o———

The United States

vs.

1. Vito Giallo Ct 1.
2. Antonio Valenti Ct 1.
3. Joseph Bosco Ct 1.
4. Edward J. Schick Jr. Ct. 1
5. Carlo M. de Julius Ct 1.
6. Arthur J. di Lorenzo Ct 1.
7. Frank Lango Cts 1 & 2.
   True Name Jack Fontana
8. Giuseppe Cutugno Cts 1 & 2.
9. Joseph C. Juliano Cts 1 & 2.
10. Sam Schifano Sr. Ct 1.
11. Sam Schifano Jr. Ct 1.

2

———o———

Title 18 Sec 371 and Title 26 Sec 2810 U S C.

Possession of unregistered still and conspiracy to violate the liquor tax laws.

3

Two counts.

Date	*Defendant*	*Fined*
10/31/52	Giuseppe Cutugno	$100.
	Jack Fontano a/k/a Frank Lango	$100.

Date	*Cash Acct. Deft.*	*Rec'd*
11/ 3/52	H J M Jan 16 1953 Pd. to U. S. Treasy. $5	5—

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4 *Docket Entries*

Date	*Name*	*Amt. Rec'd*	*Disb.*
12/ 5/52	Frank Lango	100.00	
12/12/52	Giuseppe Cutugno	100.00	
1/16/53	Pd U S Treas		200.00

Date	*Cash Acct. Deft.*	*Rec'd*
11/ 5/52	H H C Jan 16 1953 Pd. to U. S. Treasy. $5	5—

5

3/29/51 Filed indictment.

3/29/51 Bench warrant ordered as to Carlo M. De Julius. Goddard, J., bench warrant issued.

4/ 6/51 Vito Giallo pleads not guilty. Bail $5000.

Antonio Valenti pleads not guilty. Bail $5000.

Arthur J. Di Lorenzo pleads not guilty. Bail $5000.

Sam Schifano Sr. pleads not guilty. Bail $5000. Paroled until 4 PM to give bail. Defts. ordered photographed and fingerprinted.

6

Joseph Bosco pleads not guilty. Bail continued.

Frank Lango pleads not guilty. Bail continued.

Joseph C. Juliano pleads not guilty. Bail continued.

Guiseppe Cutugno pleads not guilty. Bail continued.—Florence M. Kelly assigned as atty for Cutugno. Benj. Schmier of counsel. Sugarman, J.

4/ 6/51 Sigmund L. Miller Esq. of Bridgeport, Conn. allowed to appear as atty. for Di Lorenzo. Sugarman, J.

Docket Entries

4/ 6/51	Vito Giallo—bail reduced to $3500. to cover this indictment and C130/11. Sugarman, J.	7
	Antonio Valenti—bail reduced to $3000. to cover this indictment and C130/11. Sugarman, J.	
	Arthur J. DiLorenzo—Released in custody of his atty until 4/9/51 to give bail. Bail reduced to $3000. Sugarman, J.	
	Sam Schifano, Sr., Bail reduced to $3000. Sugarman, J.	
4/ 6/51	Filed notice of appearance by Florence M. Kelly, Legal aid Atty for Giuseppe Cutugno.	8
4/10/51	Filed memorandum of Judge Sugarman, Re:—reduction of bail as to defts.	
4/10/51	Edward J. Schick, Jr. Bench warrant ordered.	
	Bench warrant issued.	
	Sam Schifano, Jr. pleads not guilty. Bail $1000.	
	Paroled until 4 PM to give bail. Deft. ordered fingerprinted. Sugarman, J.	
8/14/51	Filed Transcript of record of proceedings, dated 4/6/51.	9

10 *Docket Entries*

9/28/51	Filed Transcript of record of proceedings, dated 4/10/51.
10/ 8/51	Filed bail bond dated 4/9/51 for Arthur J. Di-Lorenzo for $3000. Continental Casualty Co., surety.
10/ 8/51	Filed bail bond dated 4/6/51 for Vito Giallo for $3500. National Surety Corp., surety.
10/ 8/51	Filed bail bond for Sam Schifano, Sr. dated 4/6/51. National Surety Corp., surety.
11 10/ 8/51	Filed bail bond dated 4/6/51 for Antonio Valenti for $3000. National Surety Corp., surety.
10/ 8/51	Filed bail bond dated 4/10/51 for Sam Schifano, Jr. for $1000. National Surety Corp., surety.
1/15/52	Bench warrant ordered for Arthur J. Di Lorenzo. Leibell, J.
1/15/52	Bench warrant issued as to Arthur J. Di Lorenzo.
1/30/52	Filed bench warrant for Carlo M. De Julius and entered marshal's return. Deft. arrested in Newark NJ 1/29/52.
12 1/30/52	Filed Court Appearance Bond for Carlo M. De Julius dated 1/29/52 for $1000. Mftrs Cas Ins Co.
2/18/52	Carlo M. De Julius Pleads Not Guilty—Bail Continued. Goddard, J.
3/ 5/52	Filed Notice of Appearance, Bernard J. Coven, 60 Wall St., NYC, Atty for Carlo M. De Julius.
3/28/52	Filed affidavits for writs of habeas corpus ad pros. (2). Issued writs for Vito Giallo and Arthur J. Di Lorenzo. Returnable 4/7/52.

Docket Entries 13

4/ 8/52 Filed Writ of Habeas Corpus ad pros. for Arthur J. Di Lorenzo—and entered return. Certified copy left with Conn. State Prison, Wethersfield Conn. 3/29/52.

4/10/52 Filed return on writ of habeas corpus ad pros. as to Vito Giallo by U S marshal, Middle District of Pa. Vito Giallo removed to So Dist of NY 4/4/52.

4/10/52 Filed order that Deft Arthur J. Di Lorenzo be transferred from the custody of the Warden of the Connecticut State Prison at Wethersfield, Conn., temporarily to the custody of the U. S. Marshal for the So. Dist. of N. Y., to be detained in accordance with law. Weinfeld, D. J. 14

4/14/52 Filed affdt for adjournment on behalf of deft. Carlo M. De Julius.

5/ 5/52 Filed certified copy of order filed 4/10/52 and entered marshal's return.—Order satisfied. The deft. Di Lorenzo to be returned to Warden of Conn. State Prison at Wethersfield Conn. Weinfeld, J.

15

6/16/52 Joseph Bosco Pleads Guilty (Atty Present) to count one.

Frank Lango Pleads Guilty (Atty Present) to cts 1 & 2.

Guiseppe Cutugno Pleads Guilty (Atty Present) to counts 1 & 2. Sentences adjd to 10/6/52—Bail continued. McGohey, D. J.

7/31/52 Filed affidavit for writ of habeas corpus ad testificandum for Arthur J. Di Lorenzo—Issued writ returnable 8/6/52.

16 *Docket Entries*

8/13/52 Arthur Di Lorenzo—produced on writ. Florence M. Kelly assigned as atty. (Bernard Moldow of counsel). Case marked off calendar. Writ satisfied. Sugarman, J.

8/18/52 Filed notice of appearance by Florence M. Kelly, Legal aid. Atty for Arthur J. Di Lorenzo.

9/11/52 Filed Writ of habeas Corpus as to Arthur J. Di Lorenzo, Memo Endorsed. Writ Satisfied 8/13/52. Sugarman, J.

17 9/17/52 Filed Transcript of record of proceedings, dated 6/16/52.

10/ 7/52 Filed Notice of Appearance, Harold J. McAuley, Atty 277, B'way, NYC substituted as atty for Deft Joseph Juliano, consented to by deft and so ordered 10/7/52. Wm. V. Connell, Clerk.

10/ 8/52 Filed order transferring deft. Vito Giallo to custody of U S Marshal until prosecution against him has been completed. Ryan, J.

10/ 9/52 Filed affdt and notice of motion for an order dismissing indictment as against Carlo De Julius or
18 for a separate trial of count 1 or for a severance of said count. Memo endorsed Motion denied. See minutes. 9/9/52. Ryan, J.

10/ 9/52 Filed affdt and notice of motion for a bill of particulars as to deft. Carlo M. De Julius. Memo endorsed. Motion denied. See minutes. 9/9/52. Ryan, J.

10/ 9/52 Filed unsigned order to show cause and affdt by atty for deft. Carlo M. De Julius. Memo endorsed—This indictment has been assigned to me by the Judge presiding in Crime I for trial; it has been set for trial for 10:30 AM on 10/9/52.

The application for an order to show cause is therefore denied, without prejudice to any application the defendant de Julius may be advised to make before me prior to the commencement of actual trial. 10/8/52. Ryan, J.

2/28/50 Filed bail bond for Joseph Cutugno dated 2/17/50 for $1000. Natl Surety Corp.

2/28/50 Filed bail bond for Frank Lango dated 2/17/50 for $1000. Natl Surety Corp.

3/22/50 Filed notice of appearance by Gustave Taft, 66 Court St. Bklyn NY as atty for Joseph Juliano, complaint dated 3/20/50 and bail bond dated 3/3/50 for $2500. Natl Surety Corp. 20

10/ 9/52 Govt moves to sever as to defts. Di Lorenzo and Sam Schifano. Motion granted. Trial begun as to defts. Vito Giallo, Antonio Valenti, Carlo M. De Julius, Joseph C. Juliano and Sam Schifano Jr. before Ryan, J.

10/10/52 Trial cont'd. Bail bond of deft. Sam Schifano Jr. cancelled and revoked by the court. Deft. remanded. 21

10/14/52 Trial cont'd.

10/15/52 Trial cont'd. Govt. rests. All certs move to dismiss etc. Motion to dismiss as to deft. Carlo M. De Julius is granted. Bail discharged. All other motions denied. Ryan, J.

10/ 9/25 Filed Transcript of record of proceedings, dated 2/18/52.

10/16/52 Trial cont'd. Deft. testimony.

10/17/52 " " Both sides rest.

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22 *Docket Entries*

10/20/52 Jury charged by the court. Officers sworn. All defts. remanded. After due deliberation the jury returns the following verdict: Count 1—Defts. Giallo, Valenti and Juliano—Guilty. Deft. Sam Schifano Jr. Not Guilty. Jury unable to agree on count 2 as to deft. Juliano. A mistrial is declared as to that count. Sentence adjd to 10/31/52 at 11:30 AM Defts. remanded. Motions adjd to 10/24/52 at 10 AM. Hearing on motion to suppress etc. made by deft. Juliano
23 set for 10/27/52 at 10 AM. Probation report ordered for deft. Juliano. Ryan, J.

10/22/52 Filed true copy of order dated 10/7/52 transferring Arthur J. Di Lorenzo temporarily to custody of U S. Marshal for So Dist of N Y. Ryan, J.

10/22/52 Filed writ of habeas corpus ad pros. for Arthur J. Di Lorenzo—Writ satisfied 10/17/52. Ryan, J.

10/22/52 Filed remand for Sam Schifano Jr dated 10/10/52. Ryan, J.

10/22/52 Filed discharge for Sam Schifano Jr dated 10/20/52. Ryan, J.

24

10/22/52 Filed affdts and notice of motion for order vacating and setting aside search warrant and suppressing evidence as to Joseph De Juliano.

10/24/52 Defts move to set aside the verdict, for a judgment of acquittal and for a new trial. Motion denied. Ryan, J.

10/27/52 Memo Endorsed on motion filed 10/22/52 Re: Joseph De Juliano "Motion denied on the merits. See stenographic minutes, 10/27/52". Ryan, J. Filed Affidavit of Julian A. Frank, Asst U. S. Atty Re motion of deft Joseph De Juliano.

25

10/27/52 Deft Frank Longo remanded in the custody of U. S. Marshal. Ryan, D. J.

10/31/52 Filed Judgment—Giuseppe Cutugno #56330 sentenced to Six Months on count one at a place of confinement to be designated by the Atty General. Three Years on count two. Execution of prison sentence suspended on count two. Probation for Three Years to begin after service of sentence on count one, subject to the standing probation order of this court. Deft fined $100. on count two and a penalty of $500. Payment of penalty remitted. Deft to stand committed until fine on count two is paid or he is otherwise discharged by due course of law. Ryan, J. The Court recommended parole if defendant's conduct in prison merits it.

26

Filed Judgment—Frank Lango—#56329, true name Jack Fontana sentenced to One Year & One Day on count one, at a place of confinement to be designated by the Atty General. Three Years on count two. Execution of prison sentence suspended on count two. Probation Three Years to begin after service of sentence on count one, subject to the standing probation order of this court. Fined $100. and penalty of $500. on count two. Payment of penalty remitted. Deft to stand committed until fine on count two is paid or he is otherwise discharged by due course of law. Ryan, D. J.

27

Filed Judgment—Vito Giallo sentenced to Five Years on count one at a place of confinement to be designated by the Atty General. Sentence to begin after service of sentence defendant is now serving. Ryan, J.

28 *Docket Entries*

Filed Judgment—Antonio Valenti sentenced to Five Years on count one at a place of confinement to be designated by the Atty General. Ryan, J.

10/31/52 Filed Judgment—Joseph Bosco sentenced to Thirty Months on count one at a place of confinement to be designated by the Atty General. Ryan, J.

Filed Judgment—Joseph C. Juliano sentenced to Eighteen Months on count one, at a place of confinement to be designated by the Atty General.

29

Issued commitments as to defts Bosco, Juliano, Fontana, Cutugano, Valenti, and Giallo.

10/31/52 Filed affdts of Harry A. Dunham, Natty Juliano and Conrad D. Juliano.

11/ 3/52 Bench warrant heretofore ordered for Edward Schick Jr and Arthur J. Di Lorenzo are withdrawn on application of Asst U S Atty Frank. Weinfeld, J.

11/10/52 Filed affidt and order for writ of habeas corpus ad test. for Joseph Cutugno. Ret. 11/13/52.

30

11/10/52 Filed affidt and order for writ of habeas corpus ad test. for Frank Lango. Ret. 11/13/52.

11/ 3/52 Filed notice of appeal by Joseph C. Juliano (HJMcA). Clerk's Fee $5.00.

11/ 5/52 Filed notice of appeal by Vito Giallo and Antonio Valenti (HKC). 11/10/52. Mailed copy to Fed. Det. Hdq. O'G. Clerk's Fee $5.00.

11/10/52 Filed remands for Antonio Valenti and J. C. Juliano dated 10/20/52. Ryan, J.

Docket Entries 31

11/10/52 Filed commitments and entered marshal's returns. Defts. Giuseppe Cutugno, Joseph C. Juliano, Vito Giallo, Joseph Bosco, Antonio Valenti and Frank Lango delivered to Det. Hdqtrs NYC 10/31/52 for service of sentences or transfer to another institution by prison van.

11/12/52 Filed notice of settlement, affidt. and order that a copy of search warrant and supporting affidavit and return be filed in place of and instead of the original search warrant nunc pro tunc as of 2/6/50. Ryan, J. 32

11/12/52 Filed true copy of search warrant dated 2/14/50 and affdt for search warrant.

11/13/52 Frank Lango sworn in supplementary proceeding before Weinfeld, J.

11/25/52 Filed Transcript of record of proceedings, dated 10/14 to 10/31/1952.

11/12/52 Filed writ of habeas corpus ad test for Joseph Cutugno—Writ returned unexecuted 11/12/52.

11/28/52 Filed bench warrants for Arthur J. Di Lorenzo and Edward J. Schick Jr. Returned unexecuted 11/18/52. 33

11/28/52 Filed writ of habeas corpus ad pros. for Vito Giallo. Writ satisfied 11/21/52. Weinfeld, J.

11/28/52 Filed writ of habeas corpus ad test for Frank Lango. Satisfied 11/13/52. Weinfeld, J.

12/29/52 Filed recognizance for Joseph C. Juliano pending appeal dated 12/23/52 for $5000.

34 *Docket Entries*

1/ 6/53 Filed stipulation extending time of V. Giallo, A. Valenti and J. C. Juliano to perfect their appeals to and including 2/15/53. So ordered. A. M. Bell, Clerk, USCA.

2/13/53 Filed stipulation extending time of V. Giallo, Antonio Valenti and J. C. Juliano to perfect their appeals to and including 3/16/53. So ordered. A. M. Bell, Clerk. USCA.

35

36

37

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 135-100

—o—

UNITED STATES OF AMERICA

v.

38

VITO GIALLO, ANTONIO VALENTI, JOSEPH BOSCO, EDWARD J. SCHICK, JR., CARLO M. DE JULIUS, ARTHUR J. DI LORENZO, FRANK LANGO, GIUSEPPE CUTUGNO, JOSEPH C. JULIANO, SAM SCHIFANO, SR. and SAM SCHIFANO, JR.,

Defendants.

—o—

The Grand Jury charges:

1. That from on or about April, 1949, and continuously thereafter up to the 15th day of February, 1950, in the Southern District of New York, Vito Giallo, Antonio Valenti, Joseph Bosco, Edward J. Schick, Jr., Carlo M. de Julius, 39
Arthur J. Di Lorenzo, Frank Lango, Giuseppe Cutugno, Joseph C. Juliano, Sam Schifano, Sr. and Sam Schifano, Jr., the defendants, did wilfully and knowingly conspire, combine, confederate and agree together and with each other and with divers other persons to the Grand Jurors unknown, to commit offenses against the United States, to wit, to violate Sections 2810, 2812, 2833(a), 2834, 2913, 3321(a) and 2803(a) of Title 26, United States Code.

2. It was a part of said conspiracy that said defendants would have in their possession and custody and under their control, a still and distilling apparatus set up, which

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40 *Indictment*

still and distilling apparatus would not be registered as required by law.

3. It was further a part of said conspiracy that said defendants would, with intent to defraud the United States of the internal revenue taxes on the spirits distilled by them, engage in and carry on the business of distillers without having given bond as required by law.

4. It was further a part of said conspiracy that said defendants would, in a building other than a distillery duly
41 authorized according to law, make and ferment mash fit for distillation and for the production of spirits.

5. It was further a part of said conspiracy that said defendants would transport and cause to be transported tax-unpaid distilled spirits in containers not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on said distilled spirits, such containers being hereinafter referred to as unstamped containers.

6. It was further a part of said conspiracy that said defendants would receive and possess tax-unpaid distilled
42 spirits in unstamped containers.

OVERT ACTS

In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York, the defendants did commit, among others, the following overt acts.

1. On or about the 11th day of May, 1949, the defendant Carlo M. de Julius visited the premises of Spring Auto Renting Company located at 89 Thompson Street, in the City and County of New York.

43

2. On or about the 1st day of June, 1949, the defendant Edward J. Schick, Jr., made an application to the Motor Vehicle Bureau of the State of New York at the Bureau's office located in the City and County of New York.

3. On or about the 6th day of June, 1949, the defendant Antonio Valenti visited the premises of Spring Auto Renting Company located at 89 Thompson Street, in the City and County of New York.

4. On or about the 9th day of August, 1949, the defendants Vito Giallo and Antonio Valenti visited the premises of National Can Company located at West Third Street, in the City and County of New York.

44

5. On or about the 30th day of September, 1949, the defendants Joseph Bosco and Vito Giallo visited a farm on R. F. D. #1, near the City of Kingston, County of Ulster.

6. On or about the 9th day of February, 1950, the defendants Antonio Valenti, Vito Giallo and Joseph Bosco met in the vicinity of Watts and West Streets in the City and County of New York. (Title 18, Section 371, United States Code).

45

SECOND COUNT

The Grand Jury further charges:

That on or about the 15th day of February, 1950, in the Southern District of New York, Frank Lango, Giuseppe Cutugno and Joseph C. Juliano, the defendants, wilfully and knowingly had in their possession, custody and under their control a still set up, having a capacity of approximately 25,000 gallons, which was not registered according to law. (Title 26, Section 2810, United States Code).

46

Excerpts From Testimony

[1] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 135-100

UNITED STATES OF AMERICA

vs.

47 VITO GIALLO, ANTONIO VALENTI, JOSEPH BOSCO, CARLOS M. DE JULIUS, ARTHUR J. DI LORENZO, FRANK LANGO, GIUSEPPE CUTUGNO, JOSEPH C. JULIANO, SAM SCHIFANO, SR. and SAM SCHIFANO, JR.,

Defendants.

Before:

HON. SYLVESTER J. RYAN, *D. J.*,
and a Jury.

New York, October 9, 1952;
48 10.30 o'clock a. m.

APPEARANCES:

MYLES J. LANE, ESQ., United States Attorney, for the Government; By LOUIS I. KAPLAN, ESQ., and JULIAN A. FRANK, ESQ., Assistant United States Attorneys.

HENRY K. CHAPMAN, ESQ., Attorney for Defendants Vito Giallo and Antonio Valenti.

HAROLD J. MCAULEY, ESQ., Attorney for Defendant Joseph C. Juliano.

George W. Carroll—For Government—Direct 49

BERNARD J. COVEN, ESQ., and ARTHUR W. BAILEY, ESQ., Attorneys for Defendant Carlos M. De Julius.

IRVING RADER, ESQ., Attorney for Defendant Sam Schifano, Jr.

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[142] GEORGE W. CARROLL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

• • •

[146] Q. Where did you follow the truck to? A. We 50
followed the truck to Delancey Street, and at the corner of Delancey Street and Essex Street, I saw Vito Giallo in his car PC-4183, watching the progress of the truck.

Mr. Chapman: I object to that, your Honor. I move to strike that out as a conclusion, not supported by any evidence previously given.

The Court: It is a conclusion.

Tell us what you saw Giallo do that led you to say that he was watching the truck?

The Witness: I saw his eyes turn in the direction of the truck as it passed him at Delancey and 51
Essex Streets. We continued to follow the truck and it went up First Avenue, went north on First Avenue, and in the Fifties or Sixties on First Avenue we saw Vito Giallo in his car PC-4183, following along behind the truck. We changed vehicles and continued to follow the truck.

• • •

[151] The Court: What was he, going around those streets, circling the premises?

The Witness: Seemed to be, your Honor.

52 *George W. Carroll—For Government—Cross*

The Court: Did you observe him do that?

The Witness: I saw him pass me at one point, going in one direction, and then return to where I was from another direction.

Q. How many times did he pass you? A. Two or three times.

Q. Did you see anything else on that date? A. That is all.

The Court: Now, how long did this passing take?

53 You say he went up one street and came down another and passed you three times. How long did that take?

The Witness: An interval of two or three minutes elapsed during the period.

• • •

[160] Q. What, if anything, happened? A. A large illicit distillery was seized.

Mr. Frank: I move to strike out the "illicit" if your Honor please.

54 A. (Continuing) A large distillery was seized.

The Court: If the defendant don't move, no reason why you should move.

• • •

[165] *Cross-examination by Mr. Chapman*:

• • •

[181] Q. And then when it stopped in the City of Kingston, where did it stop in? A. On a main thoroughfare through the City of Kingston. I don't recall the name of the street.

Q. That is exactly what I want to know. On the main thoroughfare? A. Yes, sir.

55

Q. Was it Fair Street? That is one of the big streets in Kingston. A. It may have been Fair or it may not have been. I wouldn't say.

Q. Was it on a well lighted street? A. Yes, sir.

Q. In other words, this truck did not travel in any surreptitious and secret manner while you were following [182] it, as you were able to observe.

The Court: It calls for a characterization by the witness. Objection sustained.

56

Q. Mr. Carroll—

The Court: I will ask the witness:

Did this truck travel along well traveled roads on its way up to Kingston?

The Witness: Yes, your Honor.

The Court: And in Kingston did it travel along the main thoroughfares?

The Witness: Yes, your Honor.

• • •

[203] *Redirect examination by Mr. Frank*:

57

Q. Mr Carroll, Mr. McAuley asked you before, had you ever seen any sugar or other contraband inside either the Ford truck or the PC-4183 automobile. I would like to ask you now, whether before February 15, 1950, you ever had the opportunity to inspect the inside of either the Ford truck or the PC-4183 Automobile? A. Never had the opportunity, no, sir.

Mr. Chapman: I move to strike it out; that he had as much opportunity as he ever had.

The Court: You should not sit there when an improper question is put and wait until the answer

is given and then move to strike it out; that is not the way to try a case. Your motion is granted. Don't do it again.

Next question.

Mr. Chapman: A moment. I must make an excuse. It is not a legal excuse. My heel got caught in a castor of the chair while I was trying to rise.

• • •

[207] BENJAMIN L. LANE, called as a witness on behalf of the Government, being first duly sworn, testified as
59 follows:

Direct examination Mr. Frank:

• • •

[209] The Witness: October 27, 1949.

Q. On February 11, 1950, where were you? A. On February 11, 1950, with Investigator Perkins, I was again in the vicinity of Highland traffic circle, near the Mid-Hudson Bridge. At this time I observed—this was at 4:30 in the afternoon—I observed the same truck that I had previously seen at the Roschish premises, 677—which
60 was at that time 677,435. The license plate [210] had been changed and it was for 1950 series; 130,238 on the car at this time. The truck was heavily loaded, riding low on the springs.

Investigator Perkins and myself, in a Government car, proceeded to a point at West Shokan, New York, the road being the Watson Hollow Road. I got out of the car and walked on foot up a road known as the Maltibie Hollow Road to the vicinity of premises known as the Juliano premises in the Town of Olive, West Shokan, New York.

Q. What did you see or what did you hear at that time? A. At about 6:50 I saw the same truck that I had seen on

Route 9, just north of Highland traffic circle, drive into the—drive up the side road to the premises of the Juliano farm, and observed this truck back up to the large red barn door. Shortly, I heard men's voices and then the sound of thuds, of something being unloaded from the truck. There was a large spotlight on the house that went on intermittently while I was making these observations.

• • •

[211] Q. On February 14, 1950? A. On February 14, 1950 with Investigator Perkins, I went to the United States Commissioner's office in Poughkeepsie, New York, and 62
secured—made an agent's affidavit and secured a federal search warrant for the two-story farm—farmhouse and the two story large red barn on the Joseph Juliano premises in the Town of Olive, Ulster County, New York.

Q. Where were you on February 15, 1950? A. On February 15, with Investigators King, Salanger, Kern and several other investigators, and with Lieutenant Riley, and a detachment of State Police, I assisted Investigator Perkins in the execution of search warrant at the Juliano farm premises.

Q. What did you do when you got to the Juliano farm premises? A. We drove up there. There was a heavy 63
snowfall and the roads were blocked. We couldn't drive up the road leading to the barn on the farm premises itself. We had to stop the cars and get out and walk through this snow, which was over two feet or practically two feet deep.

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[216] Q. And what did you do after that? A. In a search of the premises, I picked up a jacket, a Navy—olive-drab type jacket.

The Court: Where did you pick that up?

The Witness: In the, I would say, in a sort of living room of the Juliano farmhouse.

64 *Benjamin L. Lane—For Government—Direct*

Q. What did you do with that jacket? A. I seized the jacket, after finding papers, a number of receipts, in the pocket, pertaining to purchases made for the still.

The Court: You found papers?

The Witness: I found papers.

[217] Mr. Chapman: I ask that it be stricken out.

The Court: Strike it out.

You found papers in the jacket, did you?

The Witness: Yes.

65 Mr. Frank: I ask to have these marked for identification.

(Marked Government's Exhibits 30, 31 and 32 for identification.)

Q. I show you Government's Exhibits 30, 31 and 32 for identification and ask you whether you have ever seen these before? A. 32 is a Central Hudson Gas & Electric Corporation—

The Court: No. Have you ever seen those papers before?

66 The Witness: Yes.

The Court: Where did you first see them?

The Witness: Saw these on a desk in the Juliano farmhouse, at West Shokan, New York, on February 15, 1950.

Q. Where did you see Government's Exhibits 30 and 31 before? A. That one I didn't see (indicating). Government's Exhibit 30 I found in a pocket of Navy-type jacket owned by Joseph Juliano in the Juliano farmhouse.

Q. And did you take custody of these papers incident to your arrest? A. I did.

Mr. Chapman: I move to strike out the last part [218] of the question.

The Court: What?

Mr. Chapman: Incident to his arrest, did you take papers?

The Court: You took them at the time that you went into this farmhouse and barn on February 15th?

The Witness: Yes, sir.

The Court: All right.

Mr. Frank: I offer Government's Exhibits 30 and 32 in evidence. 68

Mr. McAuley: Your Honor, may I be permitted a few questions to determine whether there is any ground for objection here?

The Court: The nature of the inquiry you want to make at this time is rather unusual.

Mr. McAuley: It relates to the scope of authority in the search warrant.

The Court: I know, but you should have raised those questions before trial. You made no preliminary motion to suppress evidence in this case.

Mr. McAuley: I think, your Honor, I am covered by Rule 41(e). I had no knowledge— 69

The Court: You may make the motion but I won't interrupt the orderly procedure of this trial to determine this question.

[219] Mr. McAuley: For the present, no objection.

The Court: At this time.

Mr. McAuley: Very well. For the present, no objection.

The Court: You had better preserve any right your client may have. Don't misinterpret my ruling. If you object to the introduction of these papers in

70 evidence on the ground they were taken from the defendant in violation of his constitutional rights, you may make that objection now.

Mr. McAuley: I object, your Honor.

The Court: Is that the only objection you make?

Mr. McAuley: That is the only objection I make now—also that they were seized not pursuant to lawful process.

The Court: I will hear evidence on that objection, if you desire to press it at the conclusion of the trial, if it becomes necessary.

71 Mr. McAuley: Yes, your Honor.

The Court: I will not interrupt the trial for the purpose of determining this matter when you have had ample time to make these preliminary motions.

Subject to your right to renew this objection and present evidence, if it becomes necessary at a later time, the objection is overruled and they are received in [220] evidence, there being no other objection from any of the other defendants.

Mr. McAuley: Your Honor, to avoid possibly a misunderstanding by the jury, will your Honor state, in view of your Honor's remark, there was

72 plenty of time, that I was not retained in this case—

The Court: I don't know when—

Mr. Frank: I ask that that—

The Court: Counsel, please, I don't ask for any comment from you. I don't know when you were retained and I am not concerned with when you were retained. I say this indictment has been pending long enough to give the defendant ample opportunity to make preliminary motions, and I will not interrupt the orderly conduct of the trial at this time—

Mr. McAuley: Very well. Thank you.

The Court: (Continuing)—to conduct a preliminary or subsidiary hearing. Objection overruled subject to your right to renew the objection later, if it becomes necessary. The papers at this time are received in evidence.

(Marked Government's Exhibits 30 and 32 in evidence.)

Mr. Frank: With your Honor's permission, I would like to read this to the jury.

[221] The Court: You may read them or let the jury look at them. That will save time, if you will let them look at them and read them for themselves. 74

(Exhibits handed to the jury.)

(A pause.)

Q. What happened after you did that, or what did you do after you did that? A. After seizing these papers?

Q. Yes. A. I marked them for identification and made them a part of the case report for further investigation.

[225] Q. On February 20, 1950, did you have occasion to see one Joseph C. Juliano? A. I did have.

Q. Is Joseph C. Juliano here in this court? A. Yes, he is. 75

Q. Will you please point him out? A. He is the man with the blue suit, with the small mustache and heavy hair, black hair.

Mr. Frank: Correctly indicating Joseph Juliano.

Q. Did you have a conversation with him at that time? A. I did.

Q. Did you ask him—

Mr. Chapman: Just a moment. Any inquiry made and any answers given would be only binding on Juliano individually.

76 The Court: I am the one to make that ruling, Mr. Chapman.

Mr. Chapman: I understand.

[226] The Court: Thank you very much for your guidance.

Mr. Chapman: Your Honor, I am sure you don't mean to be sarcastic to me about that.

The Court: When did you have this conversation?

The Witness: On February 10th—20th.

77 The Court: February 20th?

The Witness: 1950, yes, sir.

The Court: All the other defendants, I assume, excepting Juliano, object to this in evidence, do they?

Mr. Coven: Certainly do, your Honor.

Mr. McAuley: Yes.

The Court: Objection sustained. The jury may consider only—this evidence only as to the defendant Juliano because it is alleged here that the conspiracy was from April, 1949, to February 15, 1950, and this is after the date of the conspiracy and may be only considered with reference to the defendant Juliano and is not to be considered by you in de-

78 termining the guilt, if any, of the other defendants.

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[227] Q. What did he reply? A. He said yes, "I bought the premises in 1946 intending to bring my family up from Brooklyn, where I have a garage"—"I had a garage and I did automobile repair work. My wife's health was bad and I wanted to bring her up in the country." They came up in September of 1947. He bought some cows, chickens, and a few goats, and he attempted to make a success of farming; and also doing some refrigeration and automobile repairing in the community. He did not have much success. He said he wasn't making a decent living.

So he went to New Berlin, New York, and moved in with his brother-in-law, a John Russo. He got himself a job in the Bendix Tele-Magneto Company at Sidney, New York, and worked there until December 2nd of 1949. He returned to the farm after December 2nd and stayed there for about ten days or fifteen days, and while there, a man came to the place and asked him if his name was Joe, and wanted to know if the place was for rent.

Juliano told the man that it was not for rent; he had it up for sale. But the man told him he had a truck and a car, and he was doing truck—a trucking business in the 80
vicinity of Kingston and he would like to have a place to store this truck and car, and would he [228] consider renting the premises to him. They haggled over the price. Juliano wanted $75 and the man offered $50. So they compromised on $65.

The man—this included the rental of the utilities, as what Juliano told me. In December, shortly before Christmastime, Juliano returned to the premises and he saw a young man there, a different man than the man who came to rent the premises.

Q. When you say he said December, did he say what year? A. Of 1949. This man told him that he was the 81
other man's son. He moved a deep, I believe, a deep freeze—this man helped him to move a deep freezer out of the house at that time.

I don't recall this. Can I refer to my notes?
The Court: Yes.

A. (Continuing) At the time that this man rented—the first occasion that he rented the premises, he gave Juliano $65 and a receipt was made out on the back of a business card. Juliano recalled that the business card was J. Giollanno Trucking, a Beekman Street address, and a

Barclay telephone number in New York City. He described the man as being an Italian, speaking very broken English, about between 50 to 58 years of age, fairly well dressed. He had smoked a black Italian cigar while he was conversing with him.

[229] And then on January—around December 22nd he came to the farm and saw this young man who told him that he was the son of the other man. That is the time they loaded this deep freezer on and he took it away. Juliano had a small pick-up truck.

83 On January 15th he returned to the place and he met the same young man—that is, Juliano farmhouse, and met the same young man there, and received another $65 for rental for the farm premises.

At this time this man asked Juliano to get the telephone set. Juliano went downtown and purchased the telephone set for this man.

He went back the end of January. This time he saw another man. He said this man's name was Joe. At this time he spent overnight in the farmhouse and left early in the morning.

Then he again returned on February 10, 1950. He talked to this Joe, and there was another man in there. The man, 84 apparently, was a greenhorn of a foreigner. He couldn't speak very good English.

He stayed there the night, that was on February 10th and February 11th, and left the next morning. In the morning—he stayed there until Sunday morning, which was February 12th. He stayed there the 10th, 11th and left on the—on Sunday morning, February 12th. [230] During the night of February 11th, that was Saturday night, he said he went upstairs and laid down and then came downstairs and he had coffee and talked with the two men until the early hours of the morning.

85

Q. When you say February 11th, what year do you mean? A. 1950. At daylight he got his things and he got out of the house, and, as he walked out of the house, he looked towards the barn and he saw bags of sugar stacked in front of the barn doors, but he didn't think anything of it. He got in his truck and drove off.

He claimed, too, he didn't detect any odors or see anything outside of the men going to the barn on one or two occasions.

I asked him if he would give me a statement about his connection with the farmhouse and the rental but he said he would not give me a signed statement because he was in the middle.

86

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[232] Mr. Frank: I would like to call William White to the stand, please.

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[233] WILLIAM J. WHITE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Frank:

87

Q. Mr. White, you are an investigator for the Alcohol and Tobacco Tax Unit, is that correct? A. I am.

Q. On February 15, 1950, where were you? A. I was at Shokan, New York.

Q. Will you speak up so that everybody can hear you? A. At Shokan, New York.

Q. Whereabouts in Shokan, New York? A. At the Juliano farm.

Mr. Frank: I ask to have this marked for identification.

88 *William J. White—For Government—Direct*

(Marked Government's Exhibit 34 for identification.)

Q. I show you Government's Exhibit 34 for identification and ask you whether you have ever seen it before and, if so, where? A. It was in a desk in what would be the living room of the farm house.

Q. What farm house? A. The Juliano farm.

Mr. Frank: I offer Government's Exhibit 34 for identification in evidence.

89 Mr. McCauley: No objection, your Honor, subject [234] to the same rights I preserved with respect to the other papers taken from that desk.

The Court: Received in evidence.

(Government's Exhibit 34 for identification received in evidence.)

Mr. Frank: I ask to have this marked for identification.

(Marked Government's Exhibit 35 for identification.)

90 Q. I show you Government's Exhibit 35 for identification and ask you whether you have ever seen that before and, if so, where? A. At the same place, on the desk in the living room.

Q. In what desk? A. Desk that was against the wall in the living room of the Juliano farm.

Q. In the Juliano farm house? A. That is right.

Mr. Frank: I offer Government's Exhibit 35 for identification in evidence.

With your Honor's permission, I would like to read—

The Court: Let us see what we are going to do with 35 for identification.

Mr. McAuley: No objection, subject to the same reservations of rights already made with respect to the other papers.

[235] The Court: Received in evidence.

(Government's Exhibit 35 for identification received in evidence.)

Mr. Frank: With your Honor's permission, I would like to give Government's Exhibits 34 and 35 to the jury. 92

The Court: All right. Give one to Juror No. 7 and the other one to the Foreman.

Mr. Frank: I have no further questions.

The Court: Just wait a minute, Mr. McAuley, will you, please, until the jurors look at these exhibits.

Mr. McAuley: Surely, your Honor.

(A pause.)

The Court: Was it Shick, whose name appears on this Exhibit 34—

Mr. Frank: Yes.

The Court: That was the name of the man we had some testimony concerning up around Murdock Avenue in the Bronx? 93

Mr. Frank: Yes, your Honor.

The Court: All right, Mr. McAuley.

Cross-examination by Mr. McAuley:

Q. Mr. White, I believe you just testified, with respect to Government's Exhibit 34, that you took it from a desk in the living room, while I believe you testified [236] you took Government's Exhibit 35 from the top of the desk, is that correct? A. The desk was open.

94 Q. I didn't ask you that. Is it correct? A. From the leaf, from the desk, yes.

Q. Is it correct—

The Court: From what, leaf on the desk?

The Witness: Leaf.

Q. Is it correct that you have just testified that you took Government's Exhibit 34 from the desk and Government's Exhibit 35 from the top of the desk? Do I quote you accurately? A. I believe I said I found both of them
95 at the same—on the same desk.

Q. Is that what you said? A. Yes.

Q. Where in the desk? A. In the living room.

Q. In the drawer, where? A. On the desk—on the leaf of the desk. There were some papers strewn on the top of it. They were among the papers.

Q. How big was the leaf? A. How big was it?

Q. Yes. A. I would say 15 or 18 feet by—

The Court: Feet or inches?

The Witness: The living room.

The Court: No, he is asking about the leaf on
96 the desk.

The Witness: Oh, I judge the leaf on the desk—

The Court: I assume by "the leaf" he means a [237] shelf.

The Witness: Drop leaf.

The Court: Drop leaf?

The Witness: Leaf that drops down on the desk, from the desk—from the top of the desk.

The Court: And it was exposed to view?

The Witness: That is right.

The Court: You didn't have to open the drawers?

The Witness: No, sir.

The Court: Lying right there on the top of the leaf of the desk?

The Witness: Yes, sir.

The Court: Dropped down, exposed?

The Witness: Yes, sir.

Q. What kind of desk was it? A. Old, battered-up desk.

Q. What was the shape of it? A. Ordinary desk, I would say, that you would find, small desk—not an office desk.

Q. Was it one of those old-fashioned ones— A.No. 98

Q. —where you got a key in it and you pull down the drop and write on that? A. Not as I remember, no.

Q. Tell us what kind it was. A. Just an ordinary desk with a drop leaf that fell down.

Q. What is this drop leaf? I am not clear. A. When [238] the desk is closed, this desk—this leaf closes the desk. When it drops down, it is flat.

The Court: Like a household secretary?

The Witness: Yes.

The Court: You might call it.

The Witness: That is right.

The Court: Not an office desk. 99

The Witness: As I remember it, that is the way it was.

Q. Then the vertical part of the desk was open to your view, is that right? A. Well, I couldn't say. The place was piled with a lot of furniture and stuff lying around. It was a disorderly place.

Q. I am not asking you that. A. I don't remember—

The Court: He is talking about the arrangement.

The Witness: In its arrangement, yes. I don't remember the bottom of the desk.

Q. Were there any papers in the top of the desk? A. The body of the desk, there was lots of things strewn around there.

Q. What do you mean, strewn within the desk? A. All over.

Q. You don't mean strewn in the drawer or— A. On top, all around the sides.

Q. Did you go through all these papers? A. Not [239] all of them, no.

Q. Any of them? A. Just the ones I picked out.

101 Q. Isn't it a fact you broke a lock on the door of that desk? A. I didn't break any lock on any desks.

Q. Isn't it a fact some of your brother agents broke a lock? A. I cannot answer that.

Q. All you know is what— A. That I was there, just walking in and around the place on guard duty. I walked over to the desk.

Q. What time was it when you picked up these papers? A. Oh, probably around 7 o'clock.

Q. Where had you been before 7 o'clock? A. In and around the property.

Q. What does that mean? A. Looked at the still vat—the still, house, the vat.

102 Q. Were you there at five o'clock? A. I was.

Q. What caused you—what were the circumstances which led you to go into the living room of the residence, the dwelling, and pick up these two pieces of paper at 7 o'clock? A. I was on guard duty there. I was all over the premises.

Q. Who sent you there? A. Who sent me there?

Q. Who sent you there, if someone sent you, at 7 o'clock? A. I remained on the premises for a while after the execution of the search warrant.

[240] Q. I didn't ask you that. The question is, state the circumstances, please, which led you to go to the living

room and pick up these two papers from this open desk, as you say, at 7 p. m. A. I was looking for any evidence that I could find.

Q. You were doing that on your own? A. Yes, that is right.

Q. Without any instructions? A. That is right.

Q. Do you know if you were the first one who went into the living room of that home? A. I couldn't say.

Q. But, anyway, two hours went by before you went in there and picked up these two pieces of paper? A. Probably. 104

Q. Well, yes or no? A. I believe so.

Q. Was anybody with you? A. Investigator Ekstein was with me on guard duty.

Q. Was he in the living room with you? A. He was around the premises, and the living room and the kitchen.

Q. Was anybody with you physically within the room in which—which contained this desk at about 7 o'clock, when you put your hands on these two pieces of paper? A. There were other investigators there, Investigator Lane—

Q. In the room? A. In and around the room. They weren't standing in any particular position. They [241] were moving around. 105

Q. Were you standing— A. I was inspecting the whole place.

Q. What were you doing when you picked up these two pieces of paper, please? A. Walked over to the desk, happened to see them lying there, picked them up.

Q. You mean after being there—how long were you in the living room before you walked over to get the two pieces of paper? A. Oh, maybe ten minutes.

Q. Was it just a whim that led you to walk over—

The Court: Objection sustained.

Q. You just walked over, is that right? A. That is right.

Q. During the ten minutes you were in the room did you see anybody else at that desk? A. There may have been. My attention was not directed to that desk all the time I was in the room.

Q. Do you know whether anybody else was at the desk? A. I couldn't say.

Q. How many investigators in all were in the room at that time? A. Maybe three or four.

107 Q. You named one, Ekstein. Anybody else you can name? A. Investigator Lane was there, Investigator Salanger.

Q. When you picked up these two pieces of paper [242] what did you do with them? A. Put them in an envelope and turned them over to special investigator Ginanatasio.

Q. Where was he then? A. That was on the 17th, down in New York.

Q. I am not asking that. I am asking you what you did immediately after you picked up these two pieces of paper. A. Put them in my pocket.

Q. 34 and 35. A. Put them in my pocket.

108 Q. Didn't show them to anybody? A. No.

Q. Didn't comment on them? A. No.

Q. Didn't have a conversation with anybody? A. No.

Mr. Frank: I object.

The Court: Overruled.

Q. Who was your immediate superior at that time? A. Vincent King was in charge of the execution of the warrant.

Q. Was he in the room? A. No.

Q. Was he on the premises? A. He was on the premises somewhere.

109

Q. Did you examine the desk carefully? A. No, I didn't.

Q. Did you notice there was a lock on the desk? A. No, I didn't.

Q. Did you notice there was a lock on any of the [243] drawers on the desk? A. No.

Q. Under the leaf? A. No, I didn't.

Q. And you kept these in your pocket for how long? A. About two days.

Q. Didn't tell anybody about them? A. No.

Q. Then two days later you gave them to whom? A. Special Investigator Ginanatasio.

110

Q. Did you see him pick up any papers— A. No, I didn't.

Q. —on this occasion when you were in the living room? A. No.

Q. Did you see anybody at this particular time— A. No, I didn't.

Q. —pick up any other papers? When you left the room were there men in the room after you left? A. Yes.

Q. When you went into the room had there been men in the room before you came? A. Oh yes.

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[244] BENJAMIN L. LANE resumed the stand.

111

Direct examination by Mr. Frank (Continued):

Q. Mr. Lane, going back to February 15, 1950 again, you said you were in the Juliano farm house. A. I was.

Q. And while you were on the premises you found a jacket? A. I did.

The Court: He was narrating, when he left the stand, a conversation that he said he had with the defendant Juliano.

Had you completed that?

The Witness: Yes, sir.

The Court: All right, completed your testimony with reference to that conversation.

The Witness: I ended up that he stated he was in the middle. Correct?

The Court: And that he would not give you a signed statement.

The Witness: And that he wouldn't give me a signed statement.

Mr. Frank: I ask to have this marked for identification.

113

(Marked Government's Exhibit 36 for identification.)

Q. I show you Government's Exhibit 36 for identification and ask you whether you have ever seen that before and, if so, where? A. This is a Vernon [245] Line notebook, that is the manufacturer's name, containing figures that—this notebook I found in the olive drab Navy jacket of Joseph Juliano at the farm house, living room.

Mr. Frank. I offer Government's Exhibit 36 for identification into evidence.

114

Q. Did you ever have occasion to see—

The Court: Wait. Let us finish one thing at a time. Let us see what we are going to do with this exhibit, this book, that has been offered. Any objection to it?

Mr. Coven: One moment, your Honor.

Mr. McAuley: No objection, subject to the same reservation as made with respect to Government's Exhibits 31 through 35.

Mr. Coven: No objection.

115

The Court: Received in evidence.

(Government's Exhibit 36 for identification received in evidence.)

Mr. Frank: With your Honor's permission, I would like to read this exhibit to the jury.

The Court: All right.

(Exhibit read to the jury.)

Q. Mr. Lane, did you ever see Joseph C. Juliano again after the last occasion you spoke of? A. I saw him [246] once again.

116

Q. Did you have a conversation—when was that? A. On February 27 at the office.

Q. Did you have a conversation with him at that time? A. I did.

Q. What was that conversation? A. Mr. Juliano wanted his Navy jacket back, and he also stated there were some tools or equipment missing from the still area—still site area.

Q. What did you do as a result of that conversation? A. I told him I had the jacket, and I returned it to him, and I got a signed receipt from him for the Navy jacket.

117

The Court: Was that the same jacket you found this Exhibit 36 in?

The Witness: That is the identical and the same jacket that I found various exhibits I have already described.

The Court: Juliano said that was his jacket?

The Witness: It was his jacket, and I have that signed receipt.

The Court: Did he say to you that it was his jacket?

The Witness: It was, yes sir.

* * *

118 *Benjamin L. Lane—For Government—Cross*

[249] *Cross-examination by Mr. McAuley:*

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[258] Q. When you saw this jacket what did you do with it? A. I examined the pockets and therein found papers.

Q. Which papers? A. For instance, the one, Vernon Line Notebook, bearing figures.

The Court: Exhibit 36, is it?

The Witness: Yes, sir.

119

A. (Continuing) Receipt No. 4149 from Fred Wicks Coal, Gas and Lumber, Shokan, New York, $4.50 for bottled gas.

Receipt No. W14236, from Herzog Supply Company, 9 North Front Street, Kingston, New York, for an ABC range burner, the amount of $39.85, dated January 24, 1950.

Cash sale receipt No. 12000 from Air Dunn Company, Kingston, New York, which was for $24.30, to J. Juliano. Same date, dated January 24, 1950.

Q. How many pockets were in the jacket? A. As I recall, two, two side pockets.

Q. Were all the papers you took from one pocket?

120 A. Yes, sir, one pocket.

Q. Which pocket? A. The left pocket. The left pocket of the jacket.

Q. Pocket on the front or bottom?

• • •

[269] The Court: Did he say anything about the middle?

Mr. McAuley: Your Honor—

[270] The Witness: He would be in the middle—he is in the middle.

Mr. McAuley: An hour is 60 minutes. I would not like to be telescoped in conducting this inquiry

as to what he finally said at the end. I want to explore everything that went on.

The Court: Is that a statement or an objection?

Mr. McAuley: I request, your Honor, that the Court—

The Court: I think it is rather presumptuous for you to indicate or intimate that the Court is at all telescoping your examination.

Mr. McAuley: No, your Honor.

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[286] Q. As best you can remember, Mr. Lane, with apologies to the Court in continuing the interrogation, did your affidavit contain anything concerning which you haven't testified in court? 122

Mr. Frank: I object.

The Court: Overruled.

A. My affidavit is what I testified to in court. That is my—

The Court: You were asked a simple question: Did your affidavit contain any additional matters other than those you testified to here before the jury? Yes or no, or you don't remember, as the case may be. 123

The Witness: I would like to repeat what I testified to—

Q. Did I make my question clear, Inspector? Is there anything you didn't testify to in court since we started that you remember you swore to in your affidavit? A. Yes, there was—in the affidavit there was [287] incorporated information that a truck bearing A. Juliano & Sons, and license plate 677435, was hauling sugar to an illicit still plant.

Q. Was that your own person knowledge? A. That was information relayed to me.

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124 *Arthur J. DiLorenzo—For Government—Direct*

[293] ARTHUR J. DILORENZO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Frank:

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[295] Q. What was that conversation, if you can recall? A. In purchasing a truck for them.

Q. What did Mr. Giallo say to you and what, if anything, did you say to him, as near as you can remember?

125 A. Well, the type of truck they wanted, and for what they wanted it for.

Q. Did Mr. Giallo tell you what he wanted the truck for? A. Mr. Valenti.

Q. Mr. Valenti told you? A. Yes, sir.

Q. What did he say? A. The type of truck he wanted me to buy for him.

Q. What type of truck did he want you to buy for him? A. Model F-8, Ford truck.

Q. Did he say what he was going to use it for? A. He did.

126 Mr. Chapman: I would like the conversation without any suggestions, your Honor, if there is any.

The Court: Yes. You say you discussed about the purchase of a truck with Valenti?

The Witness: Yes, your Honor.

The Court: When did you have that conversation with Valenti?

The Witness: That was about June—the latter part of June.

[296] The Court: June what year?

The Witness: 1949, sir.

The Court: Where was that conversation?

The Witness: At the Academy Wire Products.

The Court: Who was there while you talked to Valenti in June 1949?

The Witness: Present at the time?

The Court: Yes, within hearing range.

The Witness: Mr. Giallo, Mr. Valenti, and there was another defendant, that I don't know the name.

The Court: What was said at that conversation, as near as you can remember? What was said by each one?

The Witness: Type of truck that they wanted and if I could purchase it for them.

128 The Court: No, no. When you tell us the conversation, tell us, if possible, what Giallo said, and what Valenti said, and what this other defendant said, and whose name you don't know, and what you said.

The Witness: Seeing that I was in the used car business, they asked me—Mr. Giallo—if I could purchase an F8 model truck for him. I told him that I would look around and see if I could get one for him.

The Court: What else was said at that time?

The Witness: At that time? The purpose that they wanted the truck for.

129 [297] The Court: What was said about the purpose?

The Witness: The purpose, that they wanted a truck that would carry a heavy load.

The Court: Who said that?

The Witness: Both Mr. Valenti and Mr. Giallo.

The Court: Anything else said as to the character and nature of the load?

The Witness: They wanted it to carry a heavy load of sugar.

130 Q. Was anything else said as to the—what else the truck was to carry? A. For the illegal purpose of alcohol and sugar.

• • •

[310] *Cross-examination by Mr. Chapman:*

• • •

Q. Between 1937 and the conviction for which you are now serving time in Wethersfield State Prison, did you have any convictions of any crime at all? A. None, sir.

Q. You told us, I think, on direct examination,
131 [311] that you are now serving a sentence in Wethersfield State Prison in Connecticut? A. Correct, sir.

Q. And that you were convicted of manslaughter and that was the reason you are in jail now? A. Yes, sir.

Q. And that manslaughter consisted of the death—manslaughter was the result of the death of two little children, is that right?

Mr. Frank: I object to that.

The Court: You may not go into the details of the crime of which he has been convicted. You may bring it into a general category, if you desire. Was that manslaughter arising out of an auto-
132 mobile accident?

The Witness: No, your Honor.

Q. The manslaughter arising out of the death of two children in the explosion of a still you were operating?

Mr. Frank: I object to that.

The Court: I am not going to permit that.

A. Was it through the—

The Court: No further details.

A. (Continuing) Was it through the explosion of a still?

Q. Yes. A. It was not.

Q. Somebody died as the result of what you did, is that right?

[312] Mr. Frank: I object to that.

A. Somebody died as the cause of fire.

The Court: Overruled.

Q. And the fire resulted from what— A. From what?

Q. (Continuing) For which you were responsible? A. 134
The State claimed that it was from the still.

Q. Then the still exploded and the fire— A. Still did not explode.

Mr. Frank: I object.

The Court: Objection sustained. I think you have enough of the details on that.

Mr. Chapman: I respectfully except. I think, your Honor, that I should be permitted—

The Court: No, the law is well settled.

Mr. Chapman: Very well.

The Court: The law is well settled that you may 135
not go into the details on that. That testimony is received only as affecting this man's credibility.

Mr. Chapman: Quite so.

The Court: For no other purpose. He has admitted he has been convicted and is doing time now on a conviction for a manslaughter arising out of some still operation. That is all we need to know about that.

The Witness: Thank you, your Honor.

• • •

136 *Arthur J. DiLorenzo—For Government—Cross*

[332] *Further Cross-examination by Mr. Chapman:*

Q. Mr. DiLorenzo, if memory serves me right, I think you said you have always protested your innocence on the charges in this indictment, is that right?

Mr. Frank: I object, if your Honor please.
The Court: Overruled. He may answer.

A. In this indictment?
Q. Yes. A. I certainly do.

137 Q. As a matter of fact, oh, excuse me, and you gave testimony just as you gave it today before the grand jury, you said, nine months ago? A. I did, your Honor, sir.

Q. As a matter of fact, you are guilty of the charges in this indictment? A. I am not guilty of the charge.

Mr. Frank: I object.
The Court: Overruled.
Mr. Chapman: All right.
Mr. McAuley: There is no answer.
Mr. Chapman: I heard it.
Mr. McAuley: Did your Honor overrule the ob-

138 jection?

The Court: I overruled the objection, and the witness answered. He said he is not.

Mr. McAuley: I am sorry, I didn't hear it.

The Court: In other words, you had nothing to do [333] with the running of this still?

The Witness: None whatsoever, your Honor.

The Court: Or distilling of the alcohol; you were just a customer?

The Witness: Yes, your Honor.

Mr. Chapman: Your Honor, this charges conspiracy. A customer is as much guilty as either—

The Court: It is for the jury to say whether it was part of the conspiracy. Next witness. It is for the jury to say.

• • •

VINCENT J. GINANATASIO called as a witness by the Government.

• • •

[339] A. (Continuing.) I asked Juliano about the set of telephones that had been found at the still and for which I had a bill in my possession. Mr. Juliano told me that he had purchased the telephone set, intercommunication set, 140 and later on he even mentioned that he helped install it but he didn't think there was anything harmful about it.

Q. What was that last part? A. He didn't think there was anything wrong.

Q. No, the part before that I didn't hear. A. He helped install it.

Mr. McAuley. He helped install it.

A. (Continuing.) I also asked Mr. Juliano about a bill which called for 1½ inch couplings and valves, and Mr. Juliano told me that those couplings and valves were to be 141 used in connection with—were used in connection with his refrigerator repair business.

I had previously looked over the still, as I testified before, and there were valves, 1½ inch valves, and couplings, 1½ couplings, which could have been the couplings and the valves mentioned in the invoice.

Q. You don't know for certain that they were? A. No, sir, I do not. They were similar.

[340] I also asked Mr. Juliano, "Why did you run away on the morning of the 16th after you had come all the way down to the entrance of the farm?"

And he says, "Well, I didn't want to get into any trouble."

142 *Vincent J. Ginanatasio—For Government—Cross*

Q. Were you present on the 16th when he had run away? A. No, sir. We didn't get there until some time in the afternoon.

Q. Did you have any further conversation with Mr. Juliano? A. Well, I asked him about "How come did Mr. Bender's cows become sick from drinking water running through your farm?"

And he told me that some time during the summer he had picked up a load of vitamins and, as he crossed the bridge leading to his barn, a couple of bags of vitamins fell
143 off and that could be the reason why the cows got sick.

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[344] *Cross-examination by Mr. Chapman*:

• • •

[345] Q. Where do you say my client, Mr. Valenti, was when you were eight feet away? A. Mr. Valenti had—at that time, gone to, with Bosco, to the—

Q. Restaurant? A. To the restaurant, yes.

Q. Now then— A. Because I figured he might know me.

Mr. Chapman: I move to strike that out, your Honor.

144 The Court: Yes, strike it out.

Mr. Chapman: That was gratuitous and the witness should be admonished not to make such voluntary statements.

The Court: I don't think it is necessary to admonish him. Next question.

Q. You weren't hiding, in other words? A. Not when I went by the truck, no, sir.

[341] Q. After you got to Provezano's gas station—is that the right name? A. Yes, sir.

Q. Provezano's? A. Yes.

Q. What happened to you and your partner, whoever it was? A. We stayed there. I think there were four of

us. We stayed there until the following morning, at 9.30, and my partner contacted the office.

Q. What did you do? Never mind what your partner did unless you were there. A. I was told by my partner to discontinue—

Q. Never mind what you were told by your partner. What you yourself know. A. I discontinued the observation of the truck, 9.30.

Q. In other words, you went home, or wherever you had to go at the time and you left the truck where it was? A. I went back to the office, yes.

146

Q. Coming to the 16th of February, you say you found an ownership—is that what it is? A. I didn't find it.

Q. Exhibit 9. A. It was in the compartment of the truck.

Q. If you didn't go into the compartment you would not have found it, isn't that right? Didn't you say to the District Attorney you found it in the compartment? A. Postively, I said it was in the compartment of the truck.

[347] Q. That is what I asked. A. But I wasn't the only one who found it. It was there 12 hours after it was seized.

Q. Somebody found it in your presence? A. They found it before I got there but they left it in the compartment where they had found it.

147

Q. Then you found it after they found it? A. I saw it in there, yes, sir.

Q. You took it out, is that right? A. It was given to me, yes, sir.

Q. But it was in the truck? A. It was in the compartment of the truck, yes, sir.

Q. Not in a compartment of any pleasure car? A. No, in the truck.

Q. And when you seized the Plymouth black sedan from Mr. Giallo, he told you, to all your questions, directly that he didn't know anything about it and had

never been to West Shokan, is that right? A. That is right. I also told him the reason I wasn't arresting him was because he was out on bail—

Mr. Chapman: I am going to move for a mistrial if we have any more of the voluntary statements, your Honor.

The Court: Mr. Chapman, don't address the Court that way.

[348] Mr. Chapman: No. I, naturally—

The Court: Don't address the Court that way.

149 Mr. Chapman: I wasn't addressing your Honor in any way, but you can understand my rancor.

The Court: Mr. Ginanatasio—

The Witness: Yes, sir?

The Court: —don't make any statements of that nature again.

Stricken from the record and the jury are instructed to disregard them and erase them from their minds.

Go ahead. Next question.

Mr. Chapman: I think, for the record, I ought to move for a mistrial because the witness has twice

150 volunteered statements not responsive to any questions, and serving to prejudice my client.

The Court: I don't regard that as prejudicial.

Mr. Chapman: Your Honor will overrule it?

The Court: The jury will erase anything from their minds that I have stricken from the record.

Mr. Chapman: That is a very, sometimes, a very hard thing to do.

The Court: We will ask the jurors now.

Do any of you feel you cannot erase that from your mind, or any of you feel that that remark which I [349] have ordered stricken from the record would prejudice you in any way in the fair considera-

151

tion of the guilt or innocence of any of these defendants?

The jury have all indicated in the negative. Your motion is denied.

Mr. Chapman: Exception.

By Mr. Chapman:

Q. As a matter of fact, Mr. Giallo and Mr. Valenti were not arrested in this case until some time in the spring of 1951, is that right? A. After the indictment was handed down.

152

Mr. Chapman: Can you give us the date of that, Mr. Schaefer?

The Court: March 29, 1951.

Mr. Chapman: That is right.

• • •

[354] The Court: Exhibit 36—indicating Exhibit 36, memorandum book.

Q. What did he tell you? A. Found it in a jacket, Navy jacket, belonging to Juliano.

153

Q. Did you ever see the jacket? A. I beg your pardon?

Q. Did you ever see the jacket? A. Yes, sir.

Q. Did you ask Mr. Juliano on March 1st anything about Government's Exhibit 36 or Government's Exhibit 30 in evidence? A. I don't recall asking Mr. Juliano about the Exhibit 30, the septic tank.

Q. Did you ask him about the book? A. I don't recall whether I questioned him on this book or not. I had several notebooks. I had any number of papers and bills.

Q. You were an experienced investigator, weren't you? A. Yes, sir, I think I am.

Q. Did you ask him for a sample of his handwriting? A. No, sir; he wasn't required to give me any.

154 *Vincent J. Ginanatasio—For Government—Cross*

Q. Did you ask him for a sample of his handwriting? A. No, sir, I didn't.

Q. Not asking what he was required. You asked him [355] about Mrs. Bender's cows, didn't you? A. Yes, sir—Mr. Bender.

Q. Mr. Bender's cows. Had you—you had, I assume, between February 15th and March 1st conducted some investigation with reference to Mr. Bender and his cows? A. Yes, sir.

Q. Did you examine any stream on the property of Mr.
155 Bender? A. Well, we looked over the stream that ran from the—ran above Juliano's property, through the property and down through Bender's property, the adjoining farm.

Q. Did you or any other agent examine that stream prior to February 15th— A. No, sir.

Q. —1950? A. No, sir.

Q. Do you know whether anybody took any chemical samples of the water prior to February 15, 1950? A. I don't think so.

Q. Can you name a single question which you asked Mr. Juliano on that occasion which he didn't answer?

156 Mr. Frank: I object to that, if your Honor please.

The Court: Overruled. You may answer. Did he make answer to all your questions?

The Witness: Yes, sir, I would say he did.

Q. Did you ask him which part of the telephone communication [356] he said he played a part in installing? A. No, sir, I did not. I showed him the bill covering the telephone, and he says, "Yes, I bought that."

Q. Where did this conversation take place on March 1st? A. That took place in his former residence, the Juliano farm, the house part.

• • •

[358] JOHN T. MILLER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Frank:

* * *

[359] The Court: What time did you get there?

The Witness: About 5 p. m., sir.

The Court: Tell us what you did after your arrival.

[360] The Witness: I assisted in executing a 158
search warrant against the premises, arrested three men, assisted in taking inventory.

The Court: What did you see and observe?

The Witness: I saw a large St. Louis type column still, four large vats containing some fermenting mash, several five-gallon cans of alcohol; no tax stamp was attached, denoting the payment of tax.

Q. What did you do after that? A. I took—I assisted in taking inventory of the premises.

Q. Did you take samples? A. Not on the 15th, sir. 159

Q. On the 16th of February 1950, where were you? A. I was again on the Juliano farm on that day.

Q. What did you do at that time? A. I took samples of the mash and alcohol.

Q. What did you do with those samples? A. Brought them into the office on the 18th, stored them in a metal locker, and on the 20th I turned them over to the United States chemist.

Mr. Frank: Thank you. You may inquire.

Mr. Chapman: I have no questions.

Mr. McAuley: No questions.

The Court: Have you the samples he turned over?

Mr. Frank: Not at this time. I will have to recall him.

[361] The Court: What?

Mr. Frank: I will have to recall him. The samples haven't arrived as yet.

• • •

[390] BJORN H. ANDERSEN, called as a witness in behalf of the Government, being first duly sworn, testified as
161 follows:

• • •

[397] *Cross-examination by Mr. Chapman*:

• • •

[403] Q. And were you present at the office of the Alcohol Tax Unit, 143 Liberty Street, when one of the owners came down there at your request?

The Court: How is this material?

Mr. Chapman: There is testimony as to Mr. Valenti and Mr. Giallo having been at the National Can Company.

162 The Court: Well, all right, but how is this material?

Mr. Chapman: Material in respect to the fact that if they don't call these people here, I will be able to make comment on it.

The Court: If they don't call them, they don't call them, and you can make as much comment as you desire.

[404] Mr. Chapman: I don't want to argue the question—

The Court: Don't argue. You may make comment. Go ahead. We will let you go a little afield.

It is cross-examination. I am going to give you some latitude.

Did you see anybody down in your office from this Can Company?

The Witness: No, sir, I wasn't present in the interview.

Mr. Chapman: That is all.

The Court: Any other questions?

Mr. Chapman: Your Honor will allow me to take an exception to your remark?

The Court: What remark?

Mr. Chapman: That I am not—this is an examination I shouldn't make. I think I have every right to make it. 164

The Court: I have permitted you.

Mr. Chapman: It is just your Honor stated the fact, "What is it leading to?" I told you. And I feel I had a right to make and continue that cross-examination.

The Court: I have indicated that I felt you have by permitting the question.

Mr. Chapman: Very well.

The Court: Do you want to continue any further cross-examination? 165

[405] Mr. Chapman: No, I have no further questions at this time of this gentleman with respect to that.

The Court: Anything else that you want, Mr. Chapman?

Mr. Chapman: Not at this time.

The Court: All right. They jury are instructed to disregard this exchange or conversation between the Court and counsel. It has nothing to do with the guilt or innocence of these defendants or any of them.

166 *Bjorn H. Andersen—For Government—Cross*

Cross-examination by Mr. McAuley:

Q. Mr. Andersen, were you with Investigator Ginantasio on March 1st at the Juliano farm?

The Court: Will you put that knife away, or whatever you have in your hand.

Mr. McAuley: Not a knife.

The Court: Put it in your pocket.

Mr. McAuley: Yes.

• • •

167 [415] The Court: About how long after February 9, 1950, was it that you saw Schifano, approximately?

The Witness: I would assume, your Honor, it may have been a month or two months. It was sometime after—

The Court: Within two months?

The Witness: I believe so. That is my best estimate. I cannot recall the day.

The Court: When you saw Schifano this second time, in your office, did you recognize him?

168 The Witness: Yes, sir.

The Court: Did you recognize him as being the same man as you had seen in a parking lot at West and Watts Street on February 9, 1950?

The Witness: Yes, sir.

The Court: And as you sit there now, is there any doubt in your mind that the defendant Sam Schifano was the individual you saw in this lot, parking lot, at West and Watts Streets on the evening of February 9, 1950?

The Witness: No, there isn't.

• • •

John Miller—For Government—Recalled—Direct 169
Seymour Greenberg—For Government—Cross

[417] JOHN MILLER, recalled as a witness in behalf of the Government, having been previously duly sworn, further testified as follows:

Direct examination by Mr. Frank:

[418] Q. What is that? A. It is a one-pint sample of mash taken from one of the vats on the Juliano farm.

Mr. McAuley: No objection, subject to the right to make the motion I have indicated all along 170
with respect to all the evidence received.

The Court: Received in evidence.

Mr. Chapman: I move an additional objection on behalf of Giallo and Valenti: that is not connected with them in any way.

The Court: That is for the jury to say. That is an issue of fact for the jury to determine.

Mr. Chapman: I am only making the objection, your Honor.

The Court: All right, your objection is noted on the record. Whether Valenti or Giallo or any of the other defendants are connected with this 171
bottle or its contents is for the jury to determine. Testimony is presented now to justify its admission in evidence for their consideration.

* * *

[427] SEYMOUR GREENBERG, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

* * *

[431] *Cross-examination by Mr. Chapman:*

* * *

[433] Q. Do you know of your own knowledge that this truck went out on the same day or the next day? A. Yes.

Q. Did you see it go out? A. No.

Q. On what do you base your knowledge, your personal knowledge? A. Because I saw that it wasn't in the garage.

Q. Where did you see—did you see it elsewhere at any time? A. No.

Q. Do you know who took it out? A. No.

Q. Do you know whether one of your workers didn't take it out? A. I know that one of my workers didn't take it out.

173 Q. On what do you base your knowledge? A. Because the man that was there at the time told me—

Q. No. Did you base that—

Mr. Frank: Please.

The Court: Let him finish his answer now. Go ahead.

[434] Q. (Continuing)—on information—

The Court: Please. You asked him upon what he based his knowledge.

Mr. Chapman: Your Honor, I respectfully ob-

174 ject to his testifying to a conversation.

The Court: Overruled.

Mr. Chapman: Exception, if you please.

The Court: This is cross-examination. You asked him. Let him answer.

Mr. Chapman: I urge upon your Honor, he can answer categorically on information but not state conversation.

The Court: You asked him specifically upon what he based his knowledge.

Mr. Chapman: True.

The Court: He is telling you the sources of his information.

Mr. Chapman: That is right, but he is giving a conversation instead of stating categorically, information from someone else.

The Court: Do you withdraw this question?

Mr. Chapman: I will put it in another form.

The Court: Do you withdraw this question?

Mr. Chapman: I do, your Honor.

The Court: Hereafter, if you ask questions like [435] this, you are going to take the consequences.

Mr. Chapman: Your Honor, I take exception to your Honor's remark. I think I know how to ask 176
these questions, and if the answer is not responsive—

The Court: Next question, counsel.

Mr. Chapman: Please, your Honor. I didn't think you would have to admonish me.

The Court: Next question.

Mr. Chapman: I take an exception.

• • •

[436] *Cross-examination by Mr. Rader*:

[440] The Court: When you saw the picture did you identify the individual whose picture was shown 177
to you?

The Witness: Yes, yes.

The Court: Whose picture was it?

The Witness: It was that man sitting over there.

The Court: Indicating the defendant Schifano.

The Witness: Yes.

The Court: Did you identify particularly the man that had brought the truck into your garage on February [441] 10th?

The Witness: Yes.

178 *Claude Peterkin—For Government—Cross*

Mr. Rader: What was that last question, your Honor?

(Record read.)

Q. Agent Lemmler asked you whether this was the man who brought the truck into the garage? A. Yes.

Q. And you said yes? A. Yes.

Q. Did he show you any other pictures? A. Showed me a picture of a truck.

Q. Showed you a picture of a truck? A. Yes.

Q. Showed you a picture of a truck and he showed you
179 a picture of the man you now identify as Sam Schifano? A. Yes.

Q. No other pictures? A. Well, he showed me a whole booklet of pictures, if that is what you mean.

Q. I mean, did he show you any other photographs of individuals? A. Yes.

The Court: How many other photographs?

The Witness: Perhaps thirty or forty. It was in booklet form and he asked me to turn the pages, and when I turned to that page, I stopped.

* * *

180 [444] Claude Peterkin, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

* * *

[447] *Cross-examination by Mr. Chapman*:

* * *

[448] Q. Were you good and sick—were you sick three or four days? A. I was out a couple of days.

Q. Then you didn't come back until, maybe, the 13th or 14th?

The Court: Is that a fact, or was it just a week-end indisposition?

The Witness: No, sir; I works in—I just can't remember. Been a long time. I can't recall now. I can't recall now.

The Court: He can't recall.

• • •

[450] *Cross-examination by Mr. Rader:*

[455] The Court: Are you positive the man who was driving that truck was the same man as sits here now, the defendant Schifano?

The Witness: Yes, sir.

182

The Court: Any doubt in your mind about that?

The Witness: No, sir.

Q. You went across the street and had some coffee? Yes or no.

The Court: Did you later go across the street?

The Witness: Yes, sir, I went across the street and had coffee.

Q. How long were you across the street? A. Well, I say 10 or 15 minutes.

Q. You came back. Was the driver of the truck still 183 in the garage? A. No, sir, the driver went away.

Q. When the truck pulled in the garage did you see—

The Court: He said he backed the truck in the garage.

Q. You backed the truck in? A. Yes.

Q. Did you see any sign of any kind on the truck? A. There was some writing on the truck.

Q. Do you know what the writing was? A. It has been a long time. I can't remember that [456] at the present time.

Q. Did the truck have on it A. Giollanno? A. At present, it has been a pretty good while, I couldn't swear what it had on there. For two years, you know, I couldn't tell you.

Q. Is there any special reason why you remember that truck and you remember Sam Schifano? A. Well, not no particular reason. I just happened to see him on the truck and I was working there.

Q. When was the next time when you saw Sam Schifano? A. This is the next time I saw him.

185 Q. Never saw him between February 10, 1950 and today's date?

Q. Where did you see this picture? A. Well, I saw—officer brought one over there where I work there.

Q. At the garage? A. Yes.

Q. Was that the only time you saw a picture? A. No, sir.

Q. When was another time you saw a picture? A. I saw his picture this morning.

Q. Right before you came into court? A. Yes, sir.

Q. Who showed you the picture? A. Well, I don't know the fellow. Somebody downstairs. I don't know him personally.

186 [457] Q. On what floor? A. I don't know what floor it was on, to tell you the truth. I was on the elevator. They took me down there.

Q. The picture that was shown you this morning was a photograph of Sam Schifano? A. Well, it resembled. I wouldn't swear that, you know, he dressed alike because—

Q. There was a resemblance?

The Court: He said he wouldn't swear that he dressed like he is now.

Mr. Rader: I think he said something more, your Honor. He said something, resemblance.

The Court: Did you say anything more, about resemblance?

The Witness: No, sir. I say he wasn't dressed alike, his clothes weren't alike.

The Court: Was his face the same?

The Witness: Yes.

Q. Was it the same or was it a resemblance? A. Same face.

Q. Same face? A. But the clothes was different.

Q. When you first saw him, when you first saw Sam Schifano, Mr. Peterkin, what in particular did you notice 188 about him? A. His hair.

Q. You noticed his head? A. His hair.

Q. His hair? A. Yes.

[458] Q. What is unusual about his hair to you? A. Well, nothing unusual. You just—when you see a person, if you see a person, you see their hair or something that you notice.

The Court: He has hair on his head.

The Witness: Yes, sir.

Q. Is that how come you recognized him, Mr. Peterkin, 189 because of his hair? A. I recognized his face. He have a dark complexion.

Q. You recognized him because of his hair and because he has a dark complexion?

Mr. Frank: I object.

The Court: Overruled.

Is that the only means of identification?

The Witness: No, sir, that is not the only—

The Court: You recognized the features of the face?

190 *Claude Peterkin—For Government—Cross*

The Witness: Yes.

The Court: Do you recognize the whole proposition—

The Witness: Yes.

The Court: (Continuing)—the hair, the color of the skin and the features?

The Witness: Yes, sir.

Q. How many photographs were you shown this morning, [459] Mr. Peterkin? A. I would say two.

Q. Both of Mr. Schifano? A. No, sir, I don't know
191 whether both of them—both of them of Mr. Schifano. There was another photgraph.

Q. One other? A. Pardon?

Q. One other photograph and a photograph of Mr. Schifano? A. Yes, sir.

Q. When was the first time you were shown a photograph of Mr. Schifano, about how long ago? A. It was shortly—sometime after they came over. I couldn't tell you the month or date or nothing like that, but I saw the photograph.

Q. It was at the garage? A. Yes.

Q. How many photographs were you shown then—
192 A. He had a lot—a lot of photographs.

Q. Who? A. I think it was one officer there came in.

Q. You don't see him in court? A. I couldn't—with the glasses, that is the fellow there.

The Court: Indicating Mr. Lemmler

Mr. Frank: Martin Lemmler.

Q. Did you have a conversation with Agent Lemmler at the garage? A. No, sir. He was in the office and [460] later they called me in there.

Q. What happened when they called you in? A. He had photographs laid out and had the truck laid out.

Q. Photograph of the truck was laid out? A. Yes, sir.

Q. Photograph of Sam Schifano was laid out? A. No, there was a lot of them laid out.

Q. What did you do? A. He asked me to see if I could recognize the driver who was driving the truck.

Q. What happened? A. Well, I recognized this picture.

The Court: Did you pick his picture, Schifano's picture, from out amongst the group of pictures?

The Witness: Yes. 194

The Court: How many were in that group on the desk or on the table?

The Witness: Oh, he has just a lot of sets, you know, a lot of them. I wouldn't know exactly.

The Court: About how many would you say, approximately?

The Witness: Oh, I would say 10 or 15, something like that.

The Court: You picked Schifano's picture out from amongst 10 or 15 you saw?

[461] The Witness: Yes, sir.

* * * 195

[463] PETER ROSCHITSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Frank:

* * *

[464] The Court: His name is Peter Roschitsch, R-o-s-c-h-i-t-s-c-h.

The Witness: Right.

The Court: Lives over on Flatbush Avenue.

The Witness: Flatbush Avenue.

The Court: What number?

The Witness: Box 175.

The Court: Oh, that is up in Kingston?

The Witness: Kingston.

The Court: Flatbush Avenue, Kingston, New York.

The Witness: Right.

197 Q. Is there anyone here that you know? Do you recognize any of the people in this courtroom. A. I have to put my glasses on. I have to go down further. O. K.?

The Court: Yes, go down. Take your time and look over everybody.

(Witness leaves the witness stand and moves about the courtroom.)

A. (Continuing) I don't recognize anybody here.

The Court: He says he recognizes nobody here.

198 Q. I direct your attention to those five men sitting over there and ask you whether you recognize any of them.

The Court: Indicating the five defendants.

Mr. Frank: May I request Mr. Giallo to remove [465] his hand from his face, please? A. I think I know this man.

The Court: Indicating Giallo.

A. (Continuing) And I think—

The Court: Go closer. Do you have trouble with your vision? Do you have trouble seeing?

The Witness: Well, I have a little trouble, yes. I recognize this man (Indicating).

The Court: Which man? Go and put your hand on the shoulder of the man that you say you recognize.

The Witness: This man.

The Court: Indicating Giallo.

Mr. Frank: Will you go back?

The Court: Wait a minute. Let him—do you recognize the other four men or any of them? 200

The Witness: No.

The Court: All right, come back now.

(Witness returns to the witness stand.)

Q. When did you first see the man you just identified? A. (No answer).

Q. When did you first see the man you just identified? A. You mean in Kingston?

Q. That is correct. A. Well, I couldn't point out the day.

Q. The month and year? A. What's that?

[466] Q. The month and year. A. It was in '49. 201

Q. What month, do you recall? A. I think it was September, end of September, or first of October. I think it was the end of September.

Q. Where did you see him? A. At my place.

Q. Where is that? A. Box 175 Flatbush Avenue.

Q. In Kingston, New York? A. Kingston, New York.

The Court: What is your business? What kind of place do you have?

The Witness: Well, I have a farm but I am retired up there.

The Court: You have a little farm?

The Witness: I have a little farm—a big farm.

The Court: How big is it?

The Witness: It is 70 acres.

The Court: It is a big farm. What do you raise?

The Witness: No, nothing, just a little garden for myself, that's all.

The Court: No cows?

The Witness: No; I had, first.

The Court: Chickens?

The Witness: Chickens, I have about a dozen.

203

The Court: No vegetables?

The Witness: Vegetable garden, or, yes.

[467] The Court: Just for yourself? You don't sell them?

The Witness: No, sell nothing.

The Court: Got a cow?

The Witness: No. I had two and I lost one. and then I lost the calf, and I sold the other one, too.

The Court: Maybe you will have better luck with the next cow.

In September, 1949, you say you met Giallo?

The Witness: Yes.

204

The Court: How did you come to meet him?

The Witness: Was a man by the name of Bosco, I believe, he asked me—yes, not believe, yes, that is the man, that is right—he said, could he park a truck on my place, premises. I said, Yes. I didn't know nothing about it. So he parked the truck there. Then, I don't know, I think it was three, four or five days, then I told him the truck has to get out. "What's the idea of parking that truck here?"

Then he asked me if I will rent him the garages—one garage. I told him, I says, "Sure, go ahead."

I says, "The people went home." There is people there for the summer; they put their cars in the garage, too. So there was nobody there. "Yes, you can have it."

He said, "How much?"

[468] I said, "$10."

So Bosco's partner there, this Mr. Giollanno, said, "All right, $15."

Mr. Chapman: I move to strike it out. Just a moment.

The Court: I will strike out the "partner."

The Witness: Them two was together. They 206
called them partners, you know; they were together.

The Court: Who called them partners?

The Witness: Well, I call them partners.

The Court: Did you address them as partners?

The Witness: They came together, so I figured, two comes together, two partners, you know; and I mean two men come together, so two partners.

The Court: They were together?

The Witness: Yes.

So I said, "All right." Then he gave me $30.

The Court: Who gave you $30?

The Witness: Bosco. Giollanno gave Bosco the 207
money and Bosco gave me the money, and I gave the money to my wife.

The Court: For how much rent was that?

The Witness: That was two months. I asked for $10. They gave me $15 a month. They paid right away, two months, $30.

[469] The Court: Did they say anything when they gave you $15 a month, $5 a month more than you had asked for?

The Witness: He says, "It's worth it. O. K.," he says, "what's that, $10?"

The Court: You got $30 then?

The Witness—: I got $30.

The Court: You say you saw Giallo give Bosco the $30 and Bosco gave—

The Witness: Yes.

The Court: (Continuing)—it to you?

The Witness: Correct.

The Court: Did they bring any automobile or truck there?

The Witness: Well, then they said to me—I said to Bosco, "What are you going to put in?"

209 He says "2 x 4's and galvanized piping."

I says, "All right."

The Court: Go ahead. What else?

The Witness: Well, that was all.

The Court: Was anything put in your garage?

The Witness: Yes, yes, they was there several times with the truck.

The Court: Who was there, when you say "they" were there?

The Witness: Well, there was Giollano and Bosco, [470] and there was another man which I don't recognize.

210 The Court: Whom do you mean by Giollanno?

The Witness: Giolanno, well, that is the name that was on the truck. And I saw his picture already; agent showed me this picture.

The Court: Go ahead.

Q. I show you Government's Exhibit—will you put on your glasses, Mr. Roschitsch.

The Court: Did you have a boarding house there in the summertime.

The Witness: No. I have two bungalows. I rent them out.

Q. I show you Government's Exhibits 11, 12, 13 and 14 and ask you whether you have ever seen what is represented thereon before? A. That is the name of the truck.

The Court: What did you say?

The Witness: That was on the truck.

The Court: That was on the truck, indicating what exhibit is that?

Mr. Frank: Indicating Exhibit 12 in evidence.

The Witness: No, no, it wasn't Greenwich. It was Beekman Street, it seems to me. It wasn't this address, no. 212

Q. Do you remember the name that was on it? A. Giollanno.

[471] Q. How do you spell it, if you recall? A. I cannot. Not a C; G.

Q. Did anyone introduce themselves to you as Mr. Gullanno or Giollanno? A. I think—I am not sure but I think Bosco did introduce me the man.

Q. What color was the truck? A. The truck was a dark color, dark green, I think.

Q. Do you recall the make of the truck? A. No.

Q. You don't recall whether it was— A. No, I wouldn't 213 know what make it was.

Q. How many times did they park the truck in your garage? A. Outside, they were parking. About five days, I think—four or five days. I believe around that.

Q. On how many occasions did you see Mr. Giallo? A. Well, I think just about four or five times.

Q. Always at your place? A. At my place. No place else.

• • •

214 *John Bartsch—For Government—Cross*

[482] JOHN BARTSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

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[484] *Cross-examination by Mr. McAuley:*

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[492] The Court: He says not that he knows of.

Q. Perhaps you didn't understand my question. I will say it again.

215 The Court: Did you understand counsel's question?

The Witness: No, I didn't talk to him—

The Court: Did you understand the question that was asked of you?

The Witness: He asked me something about if I had any other conversation with Juliano.

Q. If I understand you, Mr. Bartsch, I take it that when you came to the courtroom this morning someone showed you that sales slip? A. Yes, that is right.

Q. Am I correct? A. That is correct.

216 Q. I am asking you another question: Did anybody show you anything or say anything to you, not about the sales slip, but about the conversation which you testified here you had with Mr. Juliano? A. That is all in the testimony. I just read what I had—testimony I gave to these gentlemen, that is all.

Q. You read it from what? I am sorry, I didn't mean to come up here. You read something? From what did you read? A. Well, it is right there, that's right.

[493] The Court: Had you testified in this case before the grand jury?

The Witness: No, I had not.

The Court: This is the first time you have given any testimony in court?

The Witness: That is right.

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[496] ARTHUR JEPPSEN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

* * *

[501] The Court: What did you do when your 218
boss gave you that instruction?

The Witness: I did get the truck ready.

The Court: What kind of truck did you get ready?

The Witness: An International truck.

The Court: What was done with reference to that truck, if anything?

The Witness: Well, he came back and he told me to go over to Brooklyn.

The Court: Who came back?

The Witness: My boss.

The Court: Who was there when your boss told 219
you to go to Brooklyn?

The Witness: Don Carlos.

The Court: That is the defendant De Julius? You call him Don Carlo?

The Witness: May I just have it straightened out? I know him as Don Carlo. I don't know his right [502] name.

The Court: Who told you his name was Don Carlo?

The Witness: I always addressed him as that, Don Carlos.

220 The Court: What kind of truck was this that you got ready?

The Witness: 1940-1941 International.

The Court: What did your boss tell you to do with that truck at that time?

The Witness: Told me to go over to, with this man, over to Brooklyn to pick up some sugar.

The Court: By "this man" you mean who?

The Witness: Don Carlo.

The Court: What did you do then, after you got
221 those instructions?

The Witness: I went with him over to Brooklyn and picked up the sugar.

The Court: Where did you go in Brooklyn?

The Witness: I know it was to a sugar plant. He directed me the way out.

The Court: Go ahead.

• • •

[513] The Court: That was the first trip?

The Witness: Yes.

The Court: Did you go out on any of the other trips with him?

222 The Witness: No.

The Court: On the other occasions, when you say he came to your place of business, did Don Carlos leave with the truck? Did he ride out with the truck or did he stay?

The Witness: Sometimes he did go out with the truck, but other times he went walking.

The Court: Did the truck return on these occasions? When Don Carlos hired a truck, was the truck later returned to your place of business?

The Witness: Oh, yes.

The Court: When it returned, did it come back empty?

The Witness: Sometimes it did come back empty. Sometimes it came back full.

The Court: About how many times would you say it came back with a load?

The Witness: I know one load, I came back with one, and then the trailer came back around twice with [514] loads.

The Court: What was the load that came back on these occasions with the trailer, the character or nature of the load?

The Witness: Sugar. 224

The Court: What, if anything, was done with the load of sugar that was returned with the trailer?

The Witness: Well, the trailer took some out, and I recall one load especially from the trailer was transferred to Slitz truck, that green GMC truck.

The Court: Same truck that had been used—

The Witness: Yes.

The Court: —when you brought the load back?

The Witness: No, no, no.

The Court: Another truck?

The Witness: This is the same truck that the other driver used, yes.

The Court: When the load was transferred— 225

The Witness: Yes.

The Court: —from the truck that you had driven over from Brooklyn?

The Witness: Yes.

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[516] *Cross-examination by Mr. Chapman*:

[518] Q. Did you bring them here? Were you asked to bring all your records? A. No. Mr. Valenti rented a truck—

226 *Joseph Juliano—Defendant—Direct*

Q. Just a minute. A. —not long ago from us.

Q. Just a minute. You answer the question without volunteering anything, please.

The Court: Let me instruct the witness.

Mr. Chapman: I wish your Honor would then, if you please—

The Court: I will give instructions, if necessary. I don't like counsel to usurp my prerogative. Next question.

227

[583] JOSEPH JULIANO, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. McAuley:

• • •

[586] The Court: What happened to the enlistment in the Marines?

The Witness: They just—they sent me a letter. I wanted to get in and they wouldn't take me because they said I had too much family. So they just gave me—I have a letter that says I can go to the draft board, period, and register.

228

Q. You were in the Army. How long were you in the Army? A. I was in the Army six months—not quite six months.

Q. Were you honorably discharged? A. Yes, I was.

Q. Thereafter what did you do? A. I was off a couple of weeks, and then I went to work in a gasoline station on Foster and McDonald.

Q. In Brooklyn, New York? A. Yes.

Q. How long did you work there? A. Oh, I stayed there about two months.

• • •

[588] The Court: How long had the seventeen—what was it, 117 acres?

The Witness: 117 acres.

The Court: Was that all rock?

The Witness: Just—yes, just a big pile of rock with a little dirt on top.

The Court: How long had it been operated as a farm? 230

[589] The Witness: It was one of the old time farms there, but it had been neglected for about seven or eight years.

Q. When you went there was there any stock or produce on the farm? A. No, I bought the stock separately.

Q. When you went there, you took your family, your wife and children? A. Yes, sir.

Q. They attended local schools, I assume? A. Yes.

Q. When you first entered upon the farm, what did you do to earn a living? A. I continued my garage work, and I went home weekends.

Q. What do you mean by that? Where did you continue 231 your garage work? A. I lived at 45 Lake Street, in Brooklyn, and my family went up for once in a while in the summer, and then when I finished up with the garage I moved up there lock, stock and barrel.

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[592] The Court: In connection with your refrigerator work, have you done installation of refrigerators?

The Witness: Yes, sir.

The Court: Have you done piping?

The Witness: Yes, sir.

The Court: Do you know how to couple pipes together?

The Witness: Yes.

The Court: Do you know how to put valves in piping?

The Witness: Yes, sir. It is all sweated work.

• • •

[594] The Court: Are there many lawyers in New Berlin?

The Witness: No, just a few. The lawyer was in Norwich.

Q. In where? A. Norwich. That is the town.

Q. Was anybody with you? A. Yes, the man who owned the property.

Q. Prior to that date you had made arrangements to buy some kind of gas station in New Berlin? A. Yes.

Q. Do you remember the name of the man from whom you were buying the station? A. George V. Zuhr, representing the Richfield Oil Company.

Q. When prior to February 14—

Mr. McAuley: Withdrawn.

[595] Q. At that time, February 14 or 15, where was your wife and where were your three children? A. At New Berlin, at Russo Dairy Farm.

Q. Who is the owner of that farm? A. My brother-in-law, John Russo.

Q. Were your children attending local schools in New Berlin? A. Yes, they were.

Q. State how long a period of time had they been attending school at New Berlin? A. Since September 1949.

Q. When prior to February 14, 1950, had you last been on the premises of the Fine and Dandy or Juliano Farm,

which ever you want to call it? A. On a Saturday. It might have been the 11th of February.

Q. 11th of February? A. That is right.

Q. Will you kindly explain the reasons for your presence on the 11th or thereabouts, of February, 1950, on the Juliano Farm? A. Well, when I moved to New Berlin, I just went with my hat and coat, and I went back to West Shokan to pick up tools and equipment that I needed in my new garage.

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[597] The Court: You were asked how many 236
times—

Q. From September—

The Court: Until when?

Q. —until February, including the visit on the 11th, how many times in all? During September, October, November, December and January, during those five months, roughly? A. Maybe three or four or five times.

Q. What was the occasion? A. Always came down to pick up some of my belongings.

[598] Q. I direct your attention back to approximately 237
Labor Day, 1949. What was your situation at that time with respect to the farming, cows and the goats, or anything else you were doing?

The Court: What has that got to do with this case?

Mr. McAuley: It is an attendant circumstance at the time.

The Court: All right.

A. What did I do with the what?

238 The Court: How was the farm going around Labor Day?

The Witness: I had to get rid of my stock.

Q. When did you get rid of your stock? A. Spring of 1949.

The Court: Did you plant any—

The Witness: No, winter of 1949. No, I planted nothing.

The Court: You didn't plant anything during the planting season of 1949?

239 The Witness: No, sir; I worked outside.

Q. You just confused me. You say the winter of 1949. I was asking you about September of 1949. A. I am—I got rid of the stock, and that is all, and the farm I just left there, that is all, period.

[599] Q. That was September, 1949?

The Court: When did you get rid of the stock?

The Witness: In the winter of 1948-1949. So the farm remained bare after that.

240 Q. You say the winter of 1948 or 1949. Which is it?

The Court: 1948 to 1949.

The Witness: 1948, 1949, both.

Mr. McAuley: I see. I am sorry.

Q. At that particular time, at or around Labor Day, 1949, were you current or in arrears on your mortgage payments? A. I was always arrears at least a month.

Q. At that time did you determine to do something with respect to disposing of the farm? A. Yes.

Q. What did you do? A. I went to John Cole.

Q. C-o-l-e? A. Yes, of Kingston. He is a real estate broker in Kingston, and I listed the place with him for sale.

Q. Can you fix the approximate time you did that? A. It could have been July or August of 1949.

Q. At or about this time, after you listed the house for sale, did you have a conversation with someone? What happened next. Did you sell the house? A. No, just—

[600] Q. Did you rent the house or the farm? A. No, just closed it up and went to New Berlin.

Q. When did you close up the house and go to New Berlin? A. Well, around Labor Day of 1949. 242

Q. Thereafter, after you went to New Berlin, did you have occasion to rent the house? A. No, because I wasn't there, period.

Q. Yes, when you went back, when you went to the house at any time, did you have a conversation— A. When I came back, I came back in the first week of December.

Q. First week of December of what year? A. Of 1949.

Q. At that time did you have a conversation with anyone? A. Well, I came in and there was no light in the place.

Q. Yes, what happened? A. And I was gone or I started going to Kingston, I had a payment to make on the mortgage, and I was getting ready to go to Kingston, 243 and a man came up and told me that the—asked me if I would rent the farm. He heard it was for sale.

Q. Where were you? What were you doing at the time this man came up to you? A. I was there around the premises, collecting tools and packing things.

Q. Where did this man come from, do you know? [601] A. He walked up the road.

Q. Did he have an automobile? A. Yes, he must have had an automobile.

Q. Did he? I am not asking whether he must have had. A. I don't know.

244 Q. Did he have an automobile? A. He must have had an automobile. He had to walk; he couldn't get up there with a car.

Q. Did you see an automobile in his immediate presence? A. No, I didn't.

The Court: Was there snow on the ground then?

The Witness: Yes.

The Court: Heavy snowfall?

The Witness: Yes, quite a bit of snow.

245 The Court: Middle of the winter?

The Witness: Well, December.

The Court: That country up there is pretty cold in December?

The Witness: Yes, first couple of snowfalls we had.

The Court: How much snow would you say was on the ground at the time of this man's visit?

The Witness: Roughly, enough there to prevent a car coming up.

The Court: The road was icy?

[602] The Witness: Nobody had gone over it, so it was just snow on top of snow.

246 Q. Would you tell us in full what this man said to you and what you said to him? A. Well, he wanted to know whether I was interested in renting the farm. I said certainly, and he said he had a truck and a car, and he was in the trucking business. He gave me a card.

Q. Do you know—do you remember what his name was, or what name he gave you? A. Well, from what—I mean, as of now, I don't remember what was on the card, but from what I have heard during the trial, I have recalled the name, yes.

Q. What was the name? A. It was Giolanno Trucking, or something or other.

247

The Court: Giollanno?

The Witness: Giollanno Trucking.

The Court: That is a common Italian name, isn't it, Giollano?

The Witness: Your Honor, I don't think it is an Italian name.

The Court: You have never heard that name before?

The Witness: Well, I heard it, something like it, but I mean, I refer to the spelling. I don't think it exists.

248

Q. Is Giollano a common Italian name? A. I was [603] born Juliano—G-i-u-l-i-a-n-o.

Q. Is Galleno—G-a-l-l-e-n-o, is that a common Italian name? A. Yes, it is.

Q. It means chickens, doesn't it? A. Well, I don't know.

Q. At the time you talked to this man were you hard up for money? A. Well, yes, because I had double overhead.

Q. Did you agree to rent the place to him? A. Yes.

Q. What were the terms, and how much rent did you charge? A. We settled for $65 a month.

Q. When was he supposed to take occupancy? A. He wanted immediate occupancy, immediate possession. I told him he couldn't touch the garages, but he wasn't interested in the garages. He wanted the barn and the house.

249

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Q. At that time were any of the buildings on the premises locked? A. Yes.

Q. Including the dwelling? A. Including the dwelling?

Q. Yes. A. Yes.

Q. What kind of lock was on the dwelling house? A. One you push a key in. Yale lock, I suppose you call it.

Q. Was there a lock on the barn? A. No, just a hook.

250 [604] Q. Was there a lock on these garages? A. Yes.

Q. What kind of lock? A. Oh, padlock.

Q. At that time did you give this man any keys? A. Just the one to go into the house, that is all.

Q. At that time you had been how many months away from the farm, up in New Berlin? A. October—

Q. Away from West Shokan and up in New Berlin? A. Two full months.

Q. At that time were there any of your possessions still in the dwelling house, or in the farm house, or in any other dwelling thereon? A. Yes, they were. They were all there.

251 Q. What? A. Well, tables, and chairs, beds, clothing, tools in the shed.

Q. When you went to New Berlin didn't you take any clothing or bedding or furniture? A. Furniture, no. Clothing, yes.

Q. I take it from the answer that where you went to live in New Berlin was already furnished? A. Yes, it was.

Q. Thereafter, after December, were you paid rent? Were you paid rent? A. After December was I paid rent?

Q. Yes, after you talked to this man? A. Oh, oh, yes.

Q. How many times were you paid rent? A. Once, once [605] by the man himself, and another time by the

252 young fellow who was in the house, and that was twice, and that was all.

Q. How much were you paid in all? A. I beg your pardon?

Q. How much were you paid in all? A. $65 twice. $65 each month.

Q. $130? A. $135.

Q. $130 or $135? A. $130.

By the Court:

Q. Had you ever met this man before? A. No, I had not, sir.

Q. He was an entire stranger to you? A. A complete stranger, yes, sir.

Q. I suppose there weren't many people on the roads or in the vicinity of your home on this day in December, 1949? A. None, sir.

Q. Did you ask him where he lived? A. Well, he said he was in business in Kingston.

Q. Did you ask him where he lived? A. No, I didn't.

Q. Did you ask him what his business was? A. Yes.

Q. Did you ask him where his business was located? A. He said he was from Kingston.

Q. Did you get the street address? A. Oh, no. 254

[606] Q. Did you get any references from him? A. Well, he claimed he worked out of New York.

Q. Did you get any references from him? A. No.

Q. Did you ask him whether he could give anybody in the neighborhood as reference? A. No, I haven't.

Q. Did you find out whether or not he had an automobile there? A. He said he had a truck.

Q. Did you see the truck? A. I didn't see a truck. I didn't see a car either.

Q. Did you go outside to look for a truck or a car? A. You can't very well see from the house.

Q. How long after you first met this stranger did you 255 give him the keys to your house? A. I gave it to him immediately upon the payment of his $65.

Q. How long an interval elapsed? A. I would say maybe twenty minutes, twenty-five minutes.

Q. You gave him the keys to the house. When you gave him the keys to the house did you make any writing? A. Yes, on his own card.

Q. Did you keep a copy of it? A. I am sure I had another card because I made out a copy on his own card as a receipt.

256 Q. Have you that card? A. I looked everywhere. I couldn't find it.

Q. What did you write on the card? A. I just wrote, [607] "Received from Mr. Giollanno, $65" for a month's rent.

Q. For a month's rent of what? A. Oh,—that is all, just a month's rent.

Q. What did you tell him? What part of the premises did you tell him he could have? A. He wanted the barn and the house.

257 Q. Did you tell him he could have the whole barn? A. Yes.

Q. Did you tell him he could have the whole house? A. Well, I told him he couldn't have the whole house. I had rooms up there and my things in it.

Q. What rooms? A. Well, the front room up there, that I had my belongings in there. I told him he couldn't go in there.

Q. Front room where, on the second floor? A. Yes.

Q. Was there a lock? A. There was no lock anywhere.

Q. Did you leave anything of value around that place? A. Just maybe a couple of extra pair of pants, that is about all, shirts.

258 Q. What about the tools and equipment? A. That was all under a lock and key.

Q. Where was that located? A. That was in the triple car garage outside the building.

Q. How much was that equipment worth, your tools [608] and equipment worth? A. About $5,000 at least.

Q. And was it tools and equipment of the type that could be easily transported or carried away in an automobile? A. Some, yes, and some no. There was a heavy welding machine.

Q. $5,000 worth? A. Oh, yes. You see, when I sold the garage in Bensonhurst, I sold just the lease, and moved everything out of it.

Q. And you gave the premises over to this man after twenty minutes of talking with him, and on the premises were $5,000 worth of equipment? A. Well, the buildings were all locked. I mean, they are by itself.

• • •

[609] The Court: You should have prepared your witness before you put him on the stand. Don't do it while he is testifying. Don't put any leading questions like that. Next question.

Q. When was it put in the ground at New Berlin, New 260
York? A. In the spring of 1950.

Q. Approximately when in the spring? A. Well, when I bought the tank or shortly thereafter, we had a frost and we had snow. We couldn't dig into the ground too easy.

Q. I didn't ask you that. I am just asking you when? I didn't ask you the reason why. A. In March.

Q. When did you put it in? A. At the end of March.

Q. Where was that septic tank physically between January 24, 1950 and the end of March? A. Was in New Berlin in the yard.

Q. When did it arrive in the yard? A. I delivered it 261
there myself.

The Court: You were asked when. When? When did you take it up to New Berlin?

The Witness: January 24, the same day or the day after.

[610] On what or how did you take it up there? A. On my little pickup truck.

Q. What kind of pickup truck did you have? A. 1948 Ford pickup.

262 Q. At the time you were operating the 1948 Ford pickup truck, did you ever have another vehicle you could use? A. Yes, I had a ton and a half Dodge truck.

Q. What year or model? A. '38 Dodge.

Q. On or about January 24, where were these two vehicles ordinarily garaged or stored? A. At that particular time one was in wherever I was, and the Dodge was in New Berlin.

Q. Will you state what type of septic tank this is, $30 septic tank? How big is it? A. About three feet in diameter and about five feet high. It looks like a hot water
263 tank.

Q. In terms of persons capacity, what is the ordinary normal use of a septic tank that size? A. Suitable for a one-family house.

Q. Accommodating how many, three or four persons, four or five, or what? A. Five or six.

Q. Has that septic tank at any time to your knowledge been on the premises of the Juliano farm? A. It has not.

Q. I show you Government's Exhibit 31 in evidence [611] and ask you if you bought the nine plumbing items— A. I did.

Q. —which are indicated on the invoice? A. I did.

264 Q. Will you tell me what you did with the two 1½" I suppose, 1½ Milwaukee gate valves, priced at $6.72? What did you do with them after you got them? A. I used them at a water pump.

Q. Where? A. In West Shokan.

Q. Whose water pump? A. I put a—

Q. The question is, whose water pump? A. Louis Tenaro.

Q. What is the address? A. He runs a boarding house in West Shokan. We have no addresses in West Shokan.

Q. Louis Tenaro? A. T-e-n-a-r-o.

Q. You did some work for him? A. Yes, sir, I did.

265

Q. Will you describe generally the kind of work you did for him on the occasion that you are referring to? A. I had to put water supply in from the brook.

Mr. Frank: May we have the date fixed of this occasion?

The Witness: From the bill. Read it off of there. It is just as good.

Mr. McAuley: The invoice is August 2, 1949.

The Witness: August 2, 1949.

266

[612] Q. Was it approximately sometime subsequent to that date? A. Yes, sir, it was.

Q. Tell us generally what is the work you did for Mr. Tenaro? A. Excuse me a minute. Let's have that bill.

Q. Yes (handing paper).

The Witness: There is another one, your Honor.

The Court: The witness says there is another bill that goes with this.

The Witness: There is another one that goes with this, 500 pipe.

Mr. McAuley: It wasn't introduced in evidence, if there is another bill.

267

The Court: Have you the other bill?

The Witness: I had, but I don't have it any more. And I used these fittings. The two gate valves are check valves. When a pump is pumping, it will pull the water up. When the pump stops, the check valves will hold the water running back.

Q. Don't have to be a plumber for us. Tell us generally; you tell us the name of the person for whom you did the work, and where he lived, and just tell us generally what you did. A. This 9002 Gilmer belt, I don't recall where I used it, but that is probably a refrigerator belt.

268 *Joseph Juliano—Defendant—Direct*

[613] Q. Is there a belt on that invoice? A. Yes, there is.

Q. What kind of belt is that? A. That is a fan belt.

Q. Fan belt? A. Yes.

Q. Do you recall what you did with the fan belt? A. It is a small belt, so it might have been on the same job for the water pump.

Q. To your knowledge, was any one of the nine items which appear on this invoice, Government's Exhibit 31, ever used or installed on any part of the property of the Fine and Dandy or Juliano farm? A. No, sir. All this
269 equipment, all this material, can be seen where it is at, and it is in Louis Tenaro's pump house, from the pump house to the stream.

Q. I show you Government's Exhibit 65 and 67, invoices from the Herzog Supply Company, for solvent, dry cells, bell wire—first, the one for solvent. Can you tell us what kind of solvent that is? A. No, I don't—

Q. Do you recall ever buying any kind of a solvent? Do you know what a solvent is, Mr. Juliano? A. Wait a minute.

The Court: Wait, Mr. McAuley.

270 Mr. Frank: I object.

A. Wait a minute. This is—yes, I know what [614] this is. This is a chemical that goes into the septic tank, and that is where it is.

Q. To destroy waste matter? A. I don't know what it is for.

Q. Did you buy it? A. Yes, I did. There is some more on that. Let's see that.

Q. (Handing paper.) A. Inch and a quarter closed nipple. I bought that for some job. Pipes and nipples, I am used to buying these things.

Q. Did you buy them? A. Yes, I did.

Q. Do you recall where you installed or used the 1¼ nipple for 45 cents? Do you recall where you used that specific nipple? A. I am not sure but, according to the date, it is close to the other one. I might have used it on the same job.

• • •

[617] Q. What was the conversation? A. He asked me if I would buy him a set of telephones. I said, "I certainly will," so I did.

Q. Was there any other conversation at that time? 272
A. In respect to telephones? No.

Q. Who was this young fellow, this man you described as a young fellow? A. I know him as Frank or—rather, they called him Frank here. I know him as Jack.

Q. Had you ever seen him before the time he asked you to buy him a set of telephones? A. Yes, I had seen him several times before.

Q. When?

By the Court:

Q. Was he the same man who rented the place from you? A. No. He claimed he is his son. 273

Q. Jack? A. Jack claimed he is the son of the old man. I asked him what happened to the old man. He said, "He's just busy," that's all.

Q. How many times after you took this $65 from this old man did you see him? A. The old man?

Q. Yes. A. That is all. That was the first and [618] the last. I didn't see him there again. I haven't seen him since.

Q. So on the occasion of your next visit to the farm, after you got the first $65, you found somebody in the farm home you didn't know? A. I inquired, "Who are

you?" And he told me, he says, the son of this Mr. Giollanno.

Q. You had owned this farm since 1946, hadn't you? A. Yes.

Q. Had you made any improvements on the farm? A. Well, I started some improvements in the house but they were never finished.

Q. How much did you spend on the house or on the barn, about? A. Two hundred, I would say, roughly, $250 in lumber, doors and flooring, which I bought in Brooklyn.

275 Q. Had you reduced the amount of the mortgage? A. Well, yes, it was going down.

Q. How much had you reduced the mortgage? A. At the time I lost the farm I think it was down to $7,500.

Q. No, at the time you rented this place in September, 1949, how much was the mortgage? A. I don't know. It couldn't have been much less. I would say around $8,000 or $7900.

[619] Q. Did you figure you had an investment in the farm, an equity there, or money of yours in the farm? A. Well, yes. Well, yes.

Q. That you could get it out, too? A. Yes.

[622] Q. To the best of your knowledge is each and
276 every entry on that last page in your handwriting, or did you write it?

Mr. Frank: I object.

The Court: Objection sustained. You are apparently attempting to have the witness contradict his own testimony, Mr. McAuley.

Mr. McAuley: I am not.

The Court: He testified first that it was in his handwriting. Then he said that it looks like it. What are you trying to do now?

Is that last page in that book in your handwriting? Yes or no?

The stenographer will note upon the record that [623] the witness looks at the books, and looks at the last page and, after looking at the last page about a minute, he turns and looks at the first page. Now looking back at the last page.

A. Your Honor, I don't recall none of this.

Q. I asked you a simple question. I will ask you again. Is that last page in that book in your handwriting? Yes or no. A. I will have to say no. 278

Mr. McAuley: All right.

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[624] The Court: I don't know what your purpose is in this, Mr. McAuley, but haven't you gone far enough with it now?

Mr. McAuley: I think I need one more line for a fair sample.

The Court: For a fair what?

Mr. McAuley: Sample.

The Court: Are you going to call a handwriting [625] expert? 279

Mr. McAuley: I am merely trying to assist my client to determine—

Mr. Frank: I object to the gratuitous statement.

Mr. McAuley: Object all you want.—whether this is or is not his handwriting.

The Court: I don't like colloquy between counsel. Stop it. You are trying what?

Mr. McAuley: I am trying to determine the truth. That is the important thing in the trial.

The Court: The witness has testified under oath—

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280 Mr. McAuley: And he is confused under oath.

The Court: Mr. McAuley,—

Mr. Frank: I object to that.

The Court (Continuing)—your statement is improper and the jury will disregard it. It is for the jury to say whether or not he is confused.

Mr. McAuley: It is for the jury.

The Court: I think we have had enough of this writing.

Come back to the stand.

Mr. McAuley: Very well.

281 (Witness resumes the witness stand.)

Q. Will you look at what you wrote, and will you look at the last page of Government's Exhibit 36 and tell [626] me if, looking at what you wrote, refreshes your recollection—

Mr. Frank: I object, if your Honor pleases.

Q. (Continuing)—or that you can say that that is your handwriting. A. I am not a handwriting expert.

282 The Court: He hasn't indicated his recollection needs refreshing, but we will overrule the objection, and let us see what the answer is. Go ahead. What is your answer?

The Witness: Your Honor, I don't get this at all.

The Court: Don't get what at all?

The Witness: I don't get it.

The Court: Don't get what? You were asked a question. We will have the question read.

The Witness: I am not a handwriting expert.

283

The Court: You are not asked about whether you are a handwriting expert.

The Witness: I said it looks like—

The Court: What looks like your writing, handwriting?

The Witness: This and this (indicating).

The Court: Indicating the memorandum book in evidence.

[627] The Witness: I know this is my writing.

The Court: Indicating the memorandum book, Government's Exhibit 36, you now say you have an idea that is in your handwriting?

284

The Witness: But I don't remember writing it.

The Court: Next question.

By Mr. McAuley:

Q. Will you look at the last page which you have just been looking at, and tell us if you recall when you made those entries. A. I didn't make any entries like this.

Q. Approximately when you made those entries, and for what purpose? A. I don't recall any entries like this.

Q. Look through the whole book and tell me if you recall making any entries which appear in that book on any one of those pages.

285

The Court: Mr. McAuley, he has already told you that the entries in the book were in his handwriting.

Mr. McAuley: I am sorry. I confined my question to the last page.

The Court: Before, he said the other pages were in his handwriting. We will ask him again.

Look at the other pages, other than the last page. Are the writings in that book in your handwriting?

286 *Joseph Juliano—Defendant—Direct*

[628] The Witness: Your Honor, it looks like my handwriting. I don't remember writing it.

Mr. McAuley: All right.

The Court: Didn't you say before that you remember writing some of those entries—

The Witness: No.

The Court (Continuing) —in the front page?

The Witness: No.

The Court: All right.

287 Q. I direct your attention specifically to the unnumbered page but which is, in order, the second page, and I direct your attention to several words which are, apparently, Italian, "latte"—l-a-t-t-e—"carloni"—c-a-r-l-o-n-i or "c-a-r-b-o-n-i", "carni" and "macaroni". A. That is Italian food.

The Court: Let me see that, will you?

Q. And I ask you if that is in your handwriting.

The Court: "latte" is cheese, is it?

The Witness: It is milk, sir.

288 The Court: Milk?

Mr. McAuley: "Fromage" is cheese.

The Court: That is French.

What is "faloni"?

The Witness: I don't know. The third one could be meat. That is "macaroni" certainly (indicating).

[629] Q. The question is, is that in your handwriting, those Italian words? A. No.

The Court: Do you have another question, Mr. McAuley?

Mr. McAuley: Yes.

The Court: I suggest you ask the witness the question, and stop those shenanigans you are doing now.

Mr. McAuley: I am sorry. I must turn the pages.

The Court: Do it in the back. You have had that book around for some time.

Mr. McAuley: Yes, but I haven't lived with it, your Honor. I respectfully except to your Honor's comment.

The Court: That is your fault.

Mr. McAuley: I can't take the Government's word— 290

The Court: None of these dramatics. Next question.

Mr. McAuley: No dramatics.

[630] Q. Yes, but I want you to describe what kind of papers they were. A. Invoices from supplies that I bought, electric bills, gas bills.

Q. Any personal papers? A. Personal papers?

Q. Family records? A. Yes.

Q. Such as what? A. Birth certificates.

Q. Whose birth certificate? A. Oh, my children.

[631] Q. Who else? A. That's all. 291

Q. Anything else?

The Court: Did you take the birth certificates with you when you moved up to New Berlin?

The Witness: No, they were locked up in the desk. I found them later on, though. They were there.

• • •

[632] The Court: What is the purpose of this, Mr. McAuley? Is the purpose of this to attack the legality of the search and the legality of the seizure

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292 of these papers and the execution of the search warrant?

Mr. McAuley: It is. I cannot be honest with the Court and answer no to that, but it is also for the very express purpose—

The Court: I expect you won't give any answer that is not honest.

Mr. McAuley: No, but I cannot partition or separate my two objectives.

The Court: What other objective have you?

293 Mr. McAuley: To attack the credibility of the Government witnesses in this case.

The Court: All right, I will receive it for that purpose.

Q. Was the desk locked or unlocked at that time? A. Locked.

Q. What kind of lock is on the desk or was on the desk on February 11th? A. A regular desk lock. Keyhole [633] like a figure 8.

Q. Like the lock in a piano? A. That is exactly right, like a piano lock.

Q. Where was the key? A. In my pocket.

294 Q. Where is the key now, if you know? A. I don't know.

Q. Was any part or portion of the wood structure of the desk, or the front enclosure of the desk— A. Yes, the lid—

Q. (Continuing)—missing on February 11th? A. Well, it wasn't missing, but it was broken off.

Q. On February 11, 1950? A. February 11, 1950? No. All intact.

Q. Please listen to me, Mr. Juliano. Did you have a blue Navy jacket? A. A brown one.

Q. Brown Navy jacket? A. Yes, sir.

295

Q. Sure it wasn't dark green? A. Well, dark green, O. D.

Mr. Frank: I object, if your Honor please.

The Court: I don't think it is so material.

The Witness: There it is there, your Honor. It is brown, I guess.

Mr. McAuley: Put a tag on this.

(Marked Defendant's Exhibit D for identification.)

296

Q. Showing you Defendant Juliano's Exhibit D for [634] identification— A. That's mine.

Q. (Continuing)—did you use that jacket on February 11, 1950? A. Did I use it on February 11th?

Q. February 11, 1950. A. Yes.

Q. You wore it that day? A. Yes.

Q. When you finished wearing it, what did you do with it? A. Took it off and put on my overcoat.

Q. When you took it off, to put on your overcoat, what did you do with that jacket? A. I left it upstairs on my bed.

Q. And your bed is on what floor? A. Second floor.

297

Q. That was where it was when you last saw it on February 11, 1950? A. Yes.

[636] The Court: You mean after you heard that the Federal agents were in possession of your farm and that a still had been found there?

The Witness: Yes, sir. Well, they didn't say any still, but they said there was trouble up there, and they said, "You had better get out of here," so I went.

The Court: Didn't you just tell us that one of your neighbors told you that there was the biggest still that you ever saw up there?

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298 The Witness: Yes, yes, yes. Yes, that's [637] right.

The Court: So you did know that?

The Witness: Yes, I did know that.

The Court: How far away from the farm were you when you were told this?

The Witness: At the crossroads, Sundown Road and Moonhaw Road.

The Court: How many miles away?

The Witness: Just a little over a mile.

299 The Court: And you were surprised to hear that, weren't you?

The Witness: Yes, I was.

The Court: And were you angry when you heard it?

The Witness: Well, I don't know whether I was confused or angry, but I just turned around and I went home.

The Court: You went back 100 miles, or 99 miles, approximately, back to New Berlin?

• • •

[640] Q. You got there eventually, is that correct? A. 300 Yes, I got there. I got there eventually that same afternoon or that evening.

Q. Will you tell us whether that was approximately two days later or nine days later? A. I believe it was next day—

The Court: You came—

A. (Continuing)—or two days.

The Court: (Continuing)—after the Government men had left the place?

The Witness: Yes. They had turned the place over to my brother, and then I came in.

Q. When you came there to the farm did you have occasion to look at the living room? A. Oh, yes. 301

Q. Will you state what you found in the living room? A. Well, everything in an unorderly—there was an unorderly mess there, that was all.

Q. What was the condition of the desk? A. That was broken open. Papers strewn everywhere. Beds, tables, chairs were just turned over, and just a [641] complete mess.

Q. Was any part of the desk which had previously been attached to a part of the desk missing? A. Well, there was about, I would say, about two inches of the door was broke off, the lock part of it, and it was just laying there. 302

Q. In the vicinity of the lock? A. It was hanging on by strands.

[645] *By the Court*:

Q. Did you tell them that on the morning of February 12— A. I told them when they asked me together and—

Q. Excuse me. A. (Continuing) I don't know what date that was.

Q. Did you tell them you were at the farm on the morning of February 12, and left that morning? A. Yes, I was there Saturday, overnight, and left Sunday morning. 303

Q. Did you tell them you had come on February 10th and had stayed until Sunday, February 12th in the morning? A. I probably did, your Honor.

Q. Did you tell them that in the morning you had seen bags of sugar at the barn door? A. No, your Honor. That is what they said.

Mr. McAuley: Take your time, Mr. Juliano.

Q. Did you during that time go into the barn? A. Never. I had no reason.

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Q. Did you go into the barn? A. No, I didn't.

Q. Did you detect any odor or any unusual smell about the barn or about the premises, the barn premises? [646] A. None whatever, your Honor.

Q. When you were there that time, did you see the telephone on the wall? A. No; I had no occasion to look for anything.

Q. Not in the barn, in the house? A. No, no.

Q. Did you install that telephone? A. I did not.

The Court: All right, Mr. McAuley.

305

By Mr. McAuley:

Q. Take your time, Mr. Juliano. Tell the jury everything that any agent said to you, any one, of the one, six, twelve or twenty who were there on that day. A. I mentioned a lot of items, and they wrote them down, and they said they were going to be nice enough and look for them and find them and have them returned. They said they had nothing to do with what was missing. They blamed it on the wrecking crew that came in and took the place apart.

306 Q. Did you make any statements with reference to the desk. A. Yes, I complained about the desk. I wanted my pistol.

Q. What did you say? A. I missed a pistol. I wanted the pistol. And the desk was busted open. I said that's not right, and as a matter of fact, they were kind of mad at me because I didn't think much of them for tearing the place apart.

[647] Mr. Frank: I move to strike out that last part.

The Court: Let it stand.

307

A. (Continuing) Well, then, they gave me a speech that all I had to do is just point out a lot of pictures there and I could walk out free, and no arrest or nothing.

Q. Who said that? A. That man (indicating).

Mr. Frank: I move to strike out the answer, "they gave me a speech."

Mr. McAuley: He heard them talking.

The Court: We will let it stand. I don't want any comments.

Mr. McAuley: I am sorry.

308

A. (Continuing) And if I didn't do that, they would put me in the middle.

Q. Who said that to you? A. Well, I can't point out who said it, but there was a lot of them. I mean, I could remember some distinctive things. So that man there (indicating) got mad at me and wouldn't even talk to me no more when I had hollered for my jacket.

Q. What man? A. That one (indicating). Nobody had it. Nobody knew anything. While we were talking anyway, I looked in the corner, on the tree, and I said "There it is," and it had a tag on the—

309

Q. Is that the same room in which you had been talk- [648] ing for some time? A. Yes. There was some filing cabinets and things there. So they talked it over among themselves and they decided to give me back the jacket. They said I will have to sign a receipt for it. I said "with pleasure."

Q. Who gave you the jacket? A. That man (indicating) and his partner.

Q. Well, did they say to you, "Joe, is this your jacket?" A. No, I said, "There's my jacket."

Q. And you took it? A. No, he gave it to me after—

Q. When you took it did they say "You had these in the jacket"? A. No, nothing was said about anything in the pockets or otherwise.

* * *

[650] Q. At the farm. Can you fix the approximate time? I believe he said March 3. A. I don't know what date it was but it was the afternoon.

Q. Well, it was, roughly, about two weeks after? A. I would say yes.

Q. Was anybody with you at the farm? A. Yes, my
311 brother.

Q. Do you know the name of the gentleman who was with Mr. Ginanatasio? A. Yes, Marty.

Q. On that day will you tell us what they said? A. There was a third one there. I am not too sure who he was.

Q. Will you tell us what they said to you by way of statements they may have made, if they made them, or questions they asked, and what replies you gave to them, either to their statements or to their questions? A. I continued complaining about the things that were missing, and Mr. King was just telling me, "Don't worry." He
312 says "We'll find the things for you, and if any one of our men took it, why, we'll make it hard for them," and so on. The rest of them just told me [651] to "Leave well enough alone;" if I didn't shut up, I would be in the cooler.

Q. Did anybody say anything to you about your overlooking the fact that the desk was busted into? A. They told me I shouldn't complain because I am lucky they didn't complain everything.

Q. Did you have a power saw? A. Yes, I had a small power saw. I had micrometers I had a number of years.

Q. Were they all taken? A. Yes.

313

The Court: Where did you keep those?

The Witness: The power saw was underneath the desk. There was a red box and there was micrometers and things in it, and that was locked, the box was locked, but anybody can walk off with it. It is like a little valise.

By the Court:

Q. When you went back after this raid on the 15th or 16th or—17th you went back— A. Yes.

314

Q. (Continuing)—did you go into the barn? A. No, I didn't go into the barn immediately.

Q. How soon? A. You didn't have to because you can look right inside from the outside. The doors were gone. Half the sides were gone.

Q. Did you look in the barn? A. Yes.

Q. What did you see in the barn? A. I couldn't [652] see much. There was a little flood in there, and there was boards, and pipes and everything. Was just a tangled mess.

Q. There was nothing that prevented you from going in the barn at that time? A. Oh, no.

315

Q. You didn't go in to look at it? A. No. I looked at it from the outside. I couldn't go in.

Q. Why not? A. Because everything was just like a big heap by the door too.

Q. Did you go up to the door and put your head in? A. Yes.

Q. You didn't try to go inside the barn to see what the condition of the barn was? A. No, at that time I didn't.

Q. How big was this barn, by the way, in floor area? A. I believe the barn was 40 by 60 up there.

316 *Joseph Juliano—Defendant—Direct*

By Mr. McAuley:

Q. Tell us what Mr. Ginantasio and Investigator Lemmler said to you on that occasion of the last talk with you? A. Well, that is all we talked about. They wanted me to tell them who I rented the place to and, if I didn't, what the consequences were, and they were going to involve them, so I told them just what I told everybody else.

Q. All right. Did you at that time—or, were you
317 [653] at that time placed under arrest? A. Yes, right then and there. Mr. Marty there, he said he had a warrant for me and anything I said after that, he said, would be held for record, or held against me, or something.

Q. This he showed you toward the end of your conversation? A. Yes, and then we later got into the car with Mr. King and the rest of them, and we drove into Newburgh, and this was quite a while after. I think it was dark out.

Q. Have you had occasion to talk with Mr. Frank, the assistant United States Attorney, who is at the present time in charge of this case? A. Oh, yes.

Q. On how many occasions? A. Well, every time I
318 came to court, practically.

Q. I don't mean hello and good-bye in the courtroom. Have you been to his room? A. At least six or seven times.

Q. Between what periods of time? A. Well, this was all during last winter and twice this week.

Q. Just answer—and twice when? A. Last week. One, let us see, I came down on the 6th—

Q. Did Mr. Frank have occasion to talk to you about this case? A. Yes.

Q. And did you have occasion to talk to him about it? A. Yes.

[654] Q. Going back to last week, will you state what the conversation was that you had with Mr. Frank?

Mr. Frank: I fail to see the relevancy of these questions.

The Court: Overruled.

A. Which instance?

Q. Starting with your last conversation with Mr. Frank and working backwards? A. The last conversation with Mr. Frank—

Q. Just a moment. Will you state what Mr. Frank said to you and what you said to Mr. Frank, your last conversation, which you told us took place last week? 320
A. Well, this involved somebody else.

The Court: You were asked to tell the conversation. Do you remember it?

Mr. McAuley: The conversation.

The Witness: Yes.

The Court: Then tell it.

The Witness: Mr. Frank told me that he was glad to hear that I came to my senses. According to my lawyer, he says, I was going to plead guilty. 321

Q. Mr. Frank told you that? A. Yes, and he said, "You just do that and," he says, "don't worry about nothing." He says, "You walk out of here free and clear." All I had to do was plead guilty.

[655] Q. This was last week? A. This was Monday. Twice.

Q. That is a week ago— A. Last Monday, yes.

Q. Before that when did you last talk to Mr. Frank? A. Last time when I came down to court in the spring. I don't remember what time it was. I think it was March or April.

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322 *Joseph Juliano—Defendant—Cross*

Q. What occasion? A. Or even May.

Q. What did Mr. Frank say to you and what did you say to him? A. Same thing, he kept telling me if I pleaded guilty he would see to it that I got out free, otherwise I'm looking at five years.

Mr. McAuley: You may examine.

Cross-examination by Mr. Frank:

* * *

323 [657] Q. In December, after you rented the farm, when was the next time you returned to the farm? A. In December?

Q. Yes. A. Well, there were several occasions when I returned.

Q. Who was present when you returned? A. There was this Jack fellow.

By the Court:

Q. How soon—(continuing) I believe you people know him as Frank.

324 The Witness: I beg your pardon?

* * *

[658] The Court: Did you leave the revolver in the desk?

The Witness: Oh, yes, that was in the desk, locked in the desk.

The Court: You left it there even when you rented it to this man whom you hadn't known before?

The Witness: Well, yes.

The Court: You didn't take the revolver out of the desk?

[659] The Witness: No.

325

Q. You left very valuable papers in the desk, didn't you? A. Yes, I did.

The Court: Did you know that the revolver number was registered on your permit?

• • •

[666] Q. What is Mr. Bell's wife's name? A. I don't know. I know him. He is an elderly man. He is a carpenter.

Q. Do you know a person by the name of Kathleen Bell? A. No, I don't.

326

The Witness: The name is Berger.

The Court: You say that after—

The Witness: Shall I tell him? The grocery store.

The Court: I suggest you don't volunteer any information.

The Witness: I mean, I know the person but I don't connect him with a store.

The Court: You impress me as being a rather alert young man. Of course, the jury is to determine whether you are alert.

327

By the Court:

[667] Q. But coming back to the house, you say you rented your house around the beginning of December, 1949? A. Yes, sir—nineteen—yes, sir.

Q. Now then, you came back about two weeks later, was it? A. I would say about two weeks.

Q. Who did you see at your house when you came back two weeks later? A. This—I know him as Jack, but they call him Frank here.

Q. And you hadn't known him before? A. No, I hadn't known him before.

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328 *Joseph Juliano—Defendant—Cross*

Q. What time did you come to your house at that time, on that visit? A. I cannot exactly say, but I was in the habit of coming in the later afternoon at all times.

Q. How long did you stay on that occasion? A. I generally stayed overnight and left the next morning.

Q. What time would you leave next morning? A. Oh, daybreak.

Q. During that time did you see anybody else except this one man? A. There was this—well, there was a short fellow with him once but, I mean, I seen him once, and I couldn't even recognize him.

329 Q. We are talking about the first occasion. Was there anybody else? A. Yes, there was another young [668] fellow there, which I think—I think he was half asleep.

Q. Did you know him? A. No, and I never saw him again after that.

Q. Did you ask either one of them what they were doing there? A. Yes, I asked Jack what he was doing there and he says, oh, Giuliano is his father.

Q. Did you ask him what he was doing around the place? A. I didn't have any occasion to ask. I said, "You fellows work around here?" He says, "I think we are going to get some sleep now. We got to ride tomorrow

330 morning," that's all.

Q. Did you ask them where they were riding to? A. No.

Q. Did you ask them what they were riding? A. No.

Q. Did you ask them who they were riding for? A. No, no, I had no occasion, your Honor.

Q. How long did you spend, that visit, with them? A. Oh, I generally stayed overnight.

Q. Did you eat a meal with them? A. Well, yes, they always found coffee there.

Q. Did you have supper with them? A. Probably, yes.

Q. Did you bring the food with you?

Mr. McAuley: May I interrupt? I cannot hear [669] the answers of the witness.

The Court: Does the jury have any difficulty hearing him? (No response.) Apparently not.

Q. Did you bring any food with you? A. I probably did, your Honor.

Q. Do you remember whether you did or not? A. No, I don't.

Q. Do you remember whether on that occasion you went out and made purchases of food? A. I never went 332
out and purchased food. If I came in, I brought it with me.

Q. Do you remember whether on that occasion you went out and bought food? A. No, no, your Honor.

Q. Did you eat your breakfast there? A. Yes.

Q. And did you pay anything for your breakfast or pay anything toward your breakfast? A. No, I didn't, your Honor.

Q. During that visit did you go out to the barn? A. I never had any occasion to, no.

Q. Did you at any time, from the beginning of December, when you say you rented the place, until the 17th 333
of February, 1950, after the raid, go out into the barn? A. No, sir, your Honor.

Q. The second time that you came, after you went there, when was that? A. The second time, I think I got the second month's rent. Must have been after the first.

[670] Q. How long did you stay there? A. Overnight, as usual.

Q. What time did you come? A. I generally came in the afternoon near dusk.

Q. Were the same two men there again? A. Yes—well, not the same two. There was this young fellow who couldn't speak English I seen the second time.

Q. Did you bring food that time? A. I don't recall.

334 Q. Did you eat any meals with them? A. I don't think so.

Q. Did you go out and look around the premises at all to see how the barn was and the garage? A. No. Might cold country there.

Q. You didn't go out? A. No, I didn't, your Honor.

Q. You went there, you say, particularly the one time on the -10th of February, was it—9th? A. 11th, I believe, if it was Saturday.

Q. My recollection is that you— A. 10th, probably.

335 Q. You went there on a Friday and stayed there until Sunday morning, is that correct? Am I correct in that? A. I believe so.

Q. Who was at the place that time? A. The same two fellows.

Q. Did you eat your meals with them during all your [671] stay that time? A. I don't remember, your Honor. Maybe I did.

Q. Do you remember whether you did or not? A. I don't.

Q. Did you see them working around the farm? A. No. At each time I saw them they were in the house, just either playing the radio or lounging around.

336 Q. What time on February 10 was it that you came to the farm? A. I don't recall, your Honor.

Q. What is your best recollection? A. I have a faint idea that I went straight into Kingston and then back to the farm.

Q. About what time? A. I would say about dusk.

Q. That was in February. Must have been around four or five o'clock? A. Yes, about that.

Q. And you stayed all the night of February 10th did you? A. Yes.

Q. And you stayed all the next day? A. Yes.

Q. That is the 11th? A. Yes.

337

Q. And you stayed the night of the 11th? A. Yes.

Q. And you left early in the morning? A. Yes. At one of those days, I think, if I remember straight, I went and put a refrigerator door seal for a Mrs. Kosuer or Kosketler.

Q. During that time that you made this visit to the [672] farmhouse, and you stayed from the 10th to the morning of the 12th, did you go out to the barn at all? A. No.

Q. You detected nothing unusual? A. Nothing.

Q. Did you talk to the men about what they were doing, what they were working at? A. No, your Honor. I had no occasion to.

338

Q. Did you see them about the house all that time? A. Yes, they were just lounging around between the kitchen and living room.

Q. Doing nothing? A. Just doing nothing.

Q. Did you ask them whether they were working at anything about the place, did you? A. No, your Honor.

Q. You didn't ask them what their business was? A. No, your Honor. One time I asked him something and he said he was tired. He said he worked three days in a row. I didn't know what he was talking about.

339

Q. Who was he? A. This Jack follow. He was out on a job.

Q. Are you able to speak Italian? A. Yes.

Q. Did you talk to this other man in Italian? A. No. He was mostly sleeping all the time.

Q. What? A. He was mostly sleeping all the time.

Q. During all that time you were there? A. You know, he was laying around.

[673] Q. You didn't inquire as to their business? A. No.

The Court: Go ahead.

340 *Joseph Juliano—Defendant—Cross*

By Mr. Frank:

Q. You saw these men up at the farm a number of times, didn't you? A. These men?

Q. Yes, Jack and the one who couldn't speak English? A. Yes.

Q. And you were down in the agent's office, the Treasury Department office, about two weeks after the truck was seized, is that right? A. I believe so.

Q. You were shown pictures at that time? A. Yes.

Q. Were you shown pictures of these men? A. I saw
341 a lot of pictures. I don't know what they showed me.

Q. Were you shown pictures of those men that you say that you saw on a number of occasions up there at your farm? A. You showed me a lot of pictures.

Q. Were you shown— A. Those two were among them. The other—

Q. You didn't identify them though, did you? A. I don't know.

Q. Did you pick out the pictures of anyone that you saw on that day? A. I don't recall.

By the Court:

342

Q. Were you shown pictures or photographs? A. Yes. [674] Your Honor, when I walked into their office, they had a lot of pictures all over the desk. I was just in the middle here. They, you know, pointed out this one and that one.

Q. Did they show you pictures? A. They showed me a lot of pictures.

Q. Did they ask you to pick out from the group of pictures they showed you the men you had seen at the farm? A. I don't recall, your Honor.

Q. Did you at any time, after the raid, see the pictures of the men whom you had met at the farm? A. I was shown those pictures somewhere.

Q. Where? A. I don't recall, your Honor, whether at the farm or whether it was at their office or—

Q. Did you pick out any pictures and identify photographs as being photographs of men whom you had seen at the farm? A. No, your Honor.

Q. Were you asked to do so? A. I was asked to—

Mr. McAuley: Your Honor, may I interrupt to ask at this time, to ask for a clarification of the question of the Court? The Court's question and Mr. Frank's has a tendency, I think, to assume— 344

The Court: Mr. McAuley, there is no need for asking for any clarification. He hasn't indicated that he didn't understand any question.

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[687] Mr. McAuley: Your Honor, the defense has no objection to Mr. Burchill conducing the examination, if he wishes.

The Court: Now, Mr. McAuley, there is no reason for you to make any such statement. Sit down. Perfectly proper for Mr. Burchill, assistant United States attorney, to sit there and to aid a younger, junior assistant. [688] Nothing wrong in that. 345

Mr. McAuley: I didn't say there was anything wrong.

The Court: Go ahead.

Mr. McAuley: I said we are perfectly willing to have the older assistant—

The Court: You know your comment was improper. Don't do it again.

• • •

[700] The Court: Look at the paper hurriedly and tell counsel whether you ever saw it before. Did you ever see it before?

Do you have to read it?

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346 *Joseph Juliano—Defendant—Cross*

The Witness: I want to see what is in it.

The Court: Without seeing what is in it, looking at it hurriedly, can you tell us whether or not you ever saw that paper before?

The Witness: Your Honor, it is a common paper.

The Court: Did you ever see it before?

The Witness: No.

The Court: All right. Now, look at it more carefully and then tell us whether you have ever seen it before, and if you have to read it, do so, in order [701] to refresh your recollection.

347 The Witness: This seems like a state—this seems like part of the discussion we had at the farm.

The Court: You were asked, did you ever see the paper before.

The Witness: Yes, I did—I didn't see the paper before. I heard the discussion before.

Q. Now I ask you, Mr. Juliano, weren't you given Government's Exhibit 63 for identification— A. Yes.

Q. —to sign down in the Newburgh office? A. Yes.

Q. So then you saw it at the Newburgh office? A. Yes, I saw that at the Newburgh office.

348 Q. You were given this to sign as a statement you made? A. I assume that is what it was, or that is what it is now.

Q. Let me read some of this to you.

Mr. McAuley: I object.

The Court: Wait a minute.

Mr. McAuley: I object, your Honor.

The Court: Objection sustained.

By the Court:

Q. When you were shown this paper, who showed it to you? A. I don't recall, your Honor.

[702] Q. Was it one of the agents? A. Oh, yes, yes, it was one of the agents—more than one.

Q. Did you read this paper at the Newburgh office? A. Yes, I did.

Q. Did you read it through? A. I believe it was read to me.

Q. Did you read it yourself? A. No.

Q. Did you have it physically in your hands at the Newburgh office? A. I don't recall, your Honor.

Q. Would you say you had read it? A. I will say that I didn't. 350

Q. Did you read it yourself at the Newburgh office? A. I don't think so. I cannot answer for sure because I don't recall. I believe it was read to me.

Q. By whom? A. By one of the agents.

Q. Did you listen to it as it was read? A. Yes, I did, if that is the same paper.

Q. Well, I don't know. A. I don't either.

Q. You looked at it, you have examined it carefully. Is that the same paper that you were shown in the Newburgh office or you saw in the Newburgh office? A. I mean, it's a common paper with a lot of writing on it.

Q. It isn't a common paper. It is a particular paper with writing on it, apparently four or five sheets. [703] A. 351 I didn't study it.

Q. Are you able to state whether that paper, which you now hold in your hand, Exhibit for identification 63, was the same paper that you saw in the Newburgh office? A. No, I can't assert that.

By Mr. Frank:

Q. Then you wish to change your previous testimony in which you stated, yes, that is the paper you saw in the Newburgh office?

352 Mr. McAuley: He didn't say so categorically.

The Court: And if he did, the jury will recall. Objection overruled.

A. No.

Q. You don't want—you don't wish to change that previous testimony? Which is it, did you see it in Newburgh or didn't you? A. I don't know if that is the paper you showed me.

Q. You said before to me, not five minutes ago, that this is the paper that you saw in the Newburgh office and
353 was given to you as a statement to sign.

Mr. McAuley: I object as argumentative.

Q. (Continuing) Did you say that?

Mr. McAuley: Objection. Argument.

The Court: Objection overruled.

Did you tell that to Mr. Frank a few minutes [704] ago, that this paper—

The Witness: I didn't get the question right, your Honor.

354 The Court: Listen to the question: Did you tell Mr. Frank a few minutes ago that this paper, Exhibit 63 for identification, was given to you in the Newburgh office and you were requested to sign it?

The Witness: Your Honor, I believe I said yes to the contents of that, that was read to me, not the paper itself.

The Court: Go ahead. Next question.

Q. Do you now say that you didn't see this paper? A. That's right, I say I didn't see that paper.

Q. But the contents of it were read to you, is that right? A. I don't know if that is the contents.

Q. Will you read Government's Exhibit— A. I read part of it.

Q. That is short. A. There's a lot of pages there.

Q. Read the whole thing.

Mr. McAuley: May the witness be requested—

A. OK.

Mr. McAuley: —to read the entire thing? And I enter a further objection that this is not the proper witness by whom to enter this exhibit.

The Court: If that is an objection, it is [705] overruled. It is proper cross-examination. 356

(A pause.)

The Court: Have you read the paper now?

The Witness: Yes, I have, your Honor.

The Court: Is your recollection refreshed as to whether or not it is—

The Witness: I have never seen that paper. That is part of a statement, your Honor. That is part of a statement.

The Court: Are the facts in that statement—

The Witness: A few facts are there.

The Court: Excuse me. Are the statements in that paper correct statements of what you told the agents? 357

The Witness: Some are and some are not.

Q. Well, are the contents of this statement the same thing which was read to you or told to you or shown to you on the day that you were in the Newburgh office? A. I don't recall.

Q. You heard Mr. Lane's testimony before, didn't you? A. You mean the other day?

Q. Major Lane's testimony the other day. A. Yes.

Q. And you heard him testify to what— A. Yes.

[706] Q. (Continuing) —you had told him.

358 *Joseph Juliano—Defendant—Cross*

The Court: That is not proper, Mr. Frank.

A. Yes, I did. About one-tenth of it—

The Court: All right, now, please.

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[711] Q. Couldn't have been mash that polluted that stream? A. I wouldn't know what mash looks like.

The Court: You saw mash later on in the barn, did you not?

359 The Witness: I did not.

Q. You never looked in the barn, did you? A. I did not.

Q. You never were inside the barn even after the agents raided it? A. I was not.

By the Court:

Q. When you were asked to get these telephones, who was the man that asked you to buy them? A. The man whose picture we just had here, Jack.

Q. Jack? A. Yes, sir.

360 [712] Q. What did he say to you, why he wanted it? A. He just asked me if I would bring him back a set of telephones. I said "I certainly will."

Q. What did you say? A. Nothing else.

Q. Did you ask him what he wanted them for? A. No, I didn't.

Q. Did he tell you what he wanted them for? A. No.

Q. Did he tell you how much he wanted to pay?

Q. Did he give you any money at the time? A. No, sir.

Q. And you went down and bought them? A. That is right. Well, he knew the price and everything else. There was a Montgomery Ward catalogue laying around. They had it on the pages—

361

Q. You didn't buy it from Montgomery Ward? A. No, I bought it in Herzog's.

Q. Was there a Sears, Roebuck in Kingston? A. No.

Q. You went into a local hardware store? A. Yes, sir.

Q. When you brought them back, what did you do with them? A. I just gave them to him in a box—package. I gave them to him and he paid me for them.

Q. Did you at that time buy bell wire? A. Yes, [713] bell wire.

Q. How many feet? A. And batteries and a pair of telephones.

362

Q. How many feet of bell wire did you buy? A. I don't recall. On the picture in the book it states just what you need.

Q. Does it tell you in the book how many yards or feet of bell wire you need? A. It must because the guy told me to get him the wire and the batteries.

Q. Did this man John or Jack tell you how many feet of bell wire to get? A. I believe he did.

Q. How many feet did he tell you? A. I don't recall. It is on the slip.

Q. Look at the slip and see if that refreshes your recollection as to how many feet he told you to get of bell wire.

363

A. I don't know how many feet there is to the pound now, but there is three bundles, three one-pound rolls of No. 18 wire.

Q. Does that refresh your recollection as to the length of bell wire that you bought? A. No, I don't recall.

Q. Do you remember how you came to buy three rolls of bell wire instead of one? A. I believe that is what he asked me to get him, three rolls of wire.

Q. And did he ask you to get three rolls or to [714] get so many feet of bell wire? A. I think he said rolls because it comes in rolls.

Q. Are you sure that is what he said? A. Fairly sure.

Q. Were you familiar with rolls of bell wire? A. Why, certainly.

Q. Are you familiar with the number of feet of bell wire in a roll now? A. No.

Q. Did you ask him why he needed all this wire and where he was going to run the phones from? A. No, I didn't.

Q. He didn't tell you, did he? A. No.

Q. After, did you see the telephones installed or any of the telephones? A. No.

365 Q. Either one of the instruments? A. No, I didn't see the telephone, sir.

Q. Did you see any wire running from the house at any time? A. There's a number of wires from the house.

Q. Did you see any wires— A. No, I didn't notice any additional wires.

The Court: Go ahead.

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[716] The Court: Now, it came in little cardboard boxes, didn't it?

The Witness: Yes, sir.

366 The Court: What was on the outside of the cardboard boxes? Didn't it say how many feet?

The Witness: No, just said pound.

The Court: Didn't it say how many feet of bell wire?

The Witness: No, I believe it said just pound.

The Court: Are you sure?

The Witness: I think they are one pounders.

The Court: Are you sure it didn't say how many feet?

The Witness: I didn't say, your Honor.

The Court: Are you sure it—

The Witness: If I was sure, I would know how long it was.

• • •

[722] The Court: Didn't you tell me this morning that you ate at the house, that you had supper at the house?

The Witness: I don't recall whether I ate at the house.

The Court: Didn't you tell me this morning you had supper at the house on one or two occasions, and had breakfast? 368

The Witness: I probably did. Breakfast consisted of coffee.

The Court: Did you eat the house? Did you have supper at the house?

The Witness: If coffee is considered eating, then I did.

The Court: Did you have supper at the house?

The Witness: I don't recall, your Honor. Probably I did.

Q. Did you ever have anything more than a cup of coffee? A. Such as? 369

[723] Q. Anything more than—

The Court: Spaghetti with meatballs?

The Witness: No, not at the farm.

The Court: Did you ever eat spaghetti and meatballs at the farm?

The Witness: No.

The Court: Did you ever have latte?

Mr. Chapman: Italians don't eat spaghetti and meatballs, only Americans.

Q. Did you ever eat latte at the house? A. What?

Q. Did you ever have latte at the house? A. Yes, I did have milk at the house.

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370 Q. At West Shokan? A. Yes.

Q. When you had—when you were there on February 9th, 10th, 11th. A. I don't know whether it was 9, 10 or 11 or any other time. I had a glass of milk there at times.

Q. Did you ever eat proloni? A. What?

Q. Proloni, is that? A. I don't know. I don't know what that is.

Q. Did you ever eat carni at the house? A. That would be meat.

Q. Did you ever have that at the house? A. I can't recall.

371 [724] Q. Did you ever have macaroni at the house? A. No.

Q. Did you ever have cake at the house? A. Possibly, yes.

Q. So you can recall whether you had coffee, and can recall whether you had milk, and you can recall whether you had cake, but you cannot recall whether you had any meat or anything else? A. That is right, because, I mean, cake and coffee, you will have, but a full meal, you will have to have it out.

* * *

[730] *Cross-examination by Mr. Chapman*:

372 Q. Mr. Juliano, do you see Mr. Giallo and Mr. Valente there, my clients? A. Yes, I do.

Q. Will you please tell the Court and jury when for the first time you ever saw them, fixing the date by reference to events or to time, month or year, if you can. A. I met these men after my arrest.

Q. Would that be— A. And my—their faces became familiar to me just as if I had known them a long time, from the pictures that were waved in front of me.

Q. You were arrested sometime in 1950? A. March—I believe it was about—some later date than the raid. Maybe five, six or about ten [731] days later.

Q. Let me tell you: It has been testified to here—
A. I don't know the exact date.
Q. —that the indictment in this case was handed down on March 29, 1951.

The Court: March 28.

Q. (Continuing) March 28, 1951. Did you meet my clients outside for the first time or for the first time in this court, downstairs? A. We met in the court.

The Court: You are correct, it is March 29th. 374
Mr. Chapman: Thank you. I thought so.

A. I met all the defendants in the court house. At no other place.
Q. Was that after you came to plead to the indictment or after your arrest? A. Well, after—I think we had a general meeting down here before an indictment—
Q. What do you mean a general meeting? A. Everybody was here.
Q. You mean in the court house? A. Everybody involved in that charge.
Q. Where did that take place? You mean a general 375
meeting, you mean you all came together? A. Yes, we were all notified to report all at one time.
Q. Where did that take place? A. I believe it was in this building.
[732] Q. At any rate, the first time you met was in this building? A. Yes.
Q. Did you have any occasion to speak to either of my clients at any time on your farm? A. I have not.
Q. If you happened to be arrested in 1950— A. Yes.
Q. Did you ever see them on your farm? A. I did not.
Q. —and you didn't see them except in the court house—
A. Yes.

Q. —did you have occasion, if you recall, to be notified or subject to notice that you will have to come to this court house any time before March 29, 1951? A. I don't remember that, counselor.

Q. As I told you, the indictment was handed down on March 29, 1951, as appears from the stamp on it. A. 1951, that is just last spring.

Q. That would be a year ago last spring? A. A year ago last spring, quite right.

Q. Do you now say with reference to the date that you met my clients at any time in this court, court house, before
377 March 29, 1951? A. No, before I had not met them. First time I met them was in the court house.

Q. And not before you were called to plead to this indictment? A. That is right. That was the only [733] occasion I had to get here.

Mr. Chapman: That is all.

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[734] *Redirect examination by Mr. McAuley:*

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[738] The Court: Had you signed a lease?

378 The Witness: Well, the first time—when was that, before December?

Q. Any time in your life. A. Oh, yes.

The Court: So you weren't unfamiliar with the rental of properties, were you?

The Witness: I had rented from people?

The Court: Yes. Did you rent your garage over in Brooklyn? Did you have a lease there?

The Witness: Oh, yes.

The Court: Did you have a lease on your apartment that you occupied?

379

[739] The Witness: No.

The Court: Did you have a gas station at any time before?

The Witness: Yes.

The Court: Did you have a lease on that?

The Witness: Yes.

Q. Have you ever lived in an apartment house or been a tenant in an apartment house in Philadelphia, for instance?

380

Mr. Frank: I object.

The Court: I think we have gone into this enough. I don't see the purpose of it. If you tell me, Mr. McAuley, that it is important, and you forgot to ask it on direct, I will permit it. I don't want to preclude you.

Mr. McAuley: I think it is material; about the same question your Honor asked the defendant.

The Court: Go ahead and ask him.

Mr. McAuley: Your Honor's inquiry—

The Court: Go ahead. Ask your question.

381

Q. You have been a tenant, have you? A. Yes, sir.

Q. Have you been a month-to-month or on a lease? A. Month-to-month.

Q. Have you signed leases for landlords? A. Only for business properties.

Q. You mean not for a dwelling? A. Never.

[740] The Court: When you rented this house, did you intend and did you rent the barn to these people, the use of the barn?

The Witness: Yes, I did.

The Court: And did you intend to rent and did you rent the house to them?

382 *Joseph Juliano—Defendant—Redirect*

The Witness: Part of the house, I did.

The Court: What part of the house did you keep for yourself?

The Witness: Just the one room upstairs where I had my—

The Court: One room upstairs?

The Witness: Yes, sir, and, of course, the garages and the tool shed didn't go with the rent.

Q. Prior to February 15, 1950, Mr. Juliano, were these papers, Government's Exhibits 30, 33, 31 and 36, your
383 personal property? A. Yes, sir, it was.

Q. Was the revolver your personal property? A. Yes, it was.

Q. Will you please enumerate any other items which were your personal property which you did not find in the residence, dwelling part of the house?

The Court: Any objection?

Q. (Continuing) When you returned there after February 15, 1950.

384 [741] Mr. Frank: I object.

The Court: Objection sustained. I think we have gone into this matter sufficiently enough.

* * *

[742] The Court: Did they say to you—

The Witness: Yes.

Q. Will you state what their exact words were? That should bring it out. A. There were some pictures placed before me on their desks and they asked me if I knew any of them. So there were two, at least two, that I did know from a few years back, and I truthfully told them

I know those people, but I don't know those in any connection here.

Q. All right. A. Then there was a particular one that they wanted me to pick him out, just to pick him out, wrong or right. That is as far as I will go there.

The Court: Did they say pick him out right or wrong?

The Witness: They wanted me, but I didn't.

The Court: Did they use—

The Witness: Yes. 386

The Court: —those words—

The Witness: Yes.

The Court: —"Pick him out right or wrong"?

The Witness: Yes.

The Court: What did you say?

[743] The Witness: I said, "I will not."

* * *

[748] JOAN JORDAN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

* * *

[751] *Cross-examination by Mr. Frank*: 387

Q. Now, Mrs. Jordan, did you have a party this year? A. No, it is in February.

Q. I mean February of 1952? A. Yes, we got together.

Q. When, what day? A. This past year, you mean?

Q. Yes.

The Court: This present year that we are in now, 1952.

Q. What day was that? A. That I don't remember, what day.

388 *Joan Jordan—For Defendants—Cross*

The Court: I didn't hear the answer.
(Record read.)
The Court: In 1951 did you have a party?

Q. Did you have a party in 1951? A. Last February we got together. It wasn't a regular party but we got [752] together.

Q. In 1951, is that? A. Yes.

Q. On what date was that? A. You mean when we had the party?

389 Q. That is right, 1951. A. It was 9th of February.

Q. Ninth of February? A. The day after my birthday.

The Court: Do you remember what day of the week it was?
The Witness: Thursday.
The Court: What year, 1951? Was it Thursday?
The Witness: 1951?
The Court: Was it on Thursday, in 1951. Are you sure of that?
The Witness: I am pretty sure.

390 The Court: What day of the week was your party held this year, in 1952?
The Witness: I don't remember just what day, but during the week.
The Court: You don't remember what day?
The Witness: No.
The Court: And what day was it in 1950? What day of the week?
The Witness: 1950?
The Court: Yes.
The Witness: I can't remember that far back.

[753] The Court: What made you say it was Thursday? Have you looked at a calendar recently of the year 1950 or 1951?

The Witness: I might have, but I didn't notice a certain day.

The Court: Did you look at the calendar of 1950 in preparation or before you took the stand to testify as a witness here?

The Witness: Well, that was 1951. I remember.

The Court: Pardon me, Madam, but will you listen to the question I am asking. 392

(Question read.)

The Witness: No, I didn't.

The Court: Have you any further questions?

• • •

[775] Mr. McAuley: With reference to the defendant Juliano, I again move to strike from the record Government's Exhibits relating to the septic tank and to the gate valves and nipples, the $11 item, as being wholly unconnected with the case and having no part in the case. The testimony that the septic tank is now and it has always been since its purchase, or two months after purchase, in New Berlin, 393 a hundred miles away from the scene, is uncontroverted and unrebutted. It would be unconscionable to leave those two exhibits in the case.

The Court: Your motion is denied. I don't think you meant to use the words which you used. Very poor choice [776] of words, Mr. McAuley. I advise that next time you use more appropriate words in connection with the action of the Court.

Your motion is denied with my observation that such evidence becomes material in the case to de-

394 *Colloquy Between Court and Counsel*

termine whether or not the defendant Juliano still had some contact with the premises after he said he leased them, and might be taken, presence in the house, might be taken to show that he was advised and knew of what was being done there at the time of the raid and prior thereto. Your motion to strike is denied.

Mr. McAuley: Will your Honor kindly instruct the jury—

The Court: And it is otherwise competent proof.

395 Mr. McAuley: Exception.

The Court: What weight it is to receive, if any, is for the jury to determine.

Mr. McAuley: Will your Honor kindly instruct the jury, if it becomes necessary, with respect to those two exhibits, that, as I understand your statement, they are received for the purpose of proving his physical presence on the property?

The Court: I didn't say that at all.

Mr. McAuley: To whatever effect your Honor spoke about the reason for their reception.

[777] The Court: I said that they are received in evidence and they might be considered by the jury

396 particularly in that one respect but they may be considered by the jury in all respects that they consider proper, in view of all the evidence in the case.

If you have any specific requests to make, submit them. I have received none yet concerning these exhibits. Your motion to strike is denied.

• • •

Verdict of Jury 397

[825] The Court: "The jury has reached a unanimous verdict on all the defendants on Count 1. We cannot agree on Count 2 regarding Juliano."

(The following occurred in the courtroom in the presence of the jury:)

The Court: Mr. Foreman, the marshal has handed me a note reading as follows:

[826] "The jury has reached a unanimous decision on all the defendants on Count No. 1. We cannot agree on Count 2 regarding Mr. Juliano."

Did you send that note? 398

The Foreman: Yes, sir.

The Court: Well, I gave this case to you this morning, I think about 11 o'clock, and I know that you have given the matter your conscientious thought and consideration because I have observed throughout the trial the attentiveness that you jurors displayed while the witnesses were testifying and while the evidence was being presented. I think that you have been out long enough on Count 2, and I am not going to question your decision, which I know reflects your verdict or your feeling.

Is that still the feeling of the jurors, that you cannot agree on Count 2? 399

The Foreman: Yes, sir.

The Court: I know that it is a result of your conscientious efforts to arrive at a verdict, and I don't think it would be fair, either to the defendant Juliano or to you jurors, to ask you to consider Count 2 any further.

We will take your verdict on Count 1. First the clerk will call the roll of jurors.

[827] (Roll call.)

400 *Verdict of Jury*

The Clerk: Mr. Foreman, have you agreed upon a verdict on Count 1?

The Foreman: Yes, we have.

The Clerk: How say you?

The Foreman: Mr. Giallo, guilty; Mr. Valenti, guilty; Sam Schifano, Jr., not guilty; Juliano, guilty.

The Clerk: Members of the jury, listen to your verdict as it stands recorded: Vito Giallo, on Count 1, guilty; Antonino Valenti, Count 1, guilty; Joseph C. Juliano, Count 1, guilty; Sam Schifano, Jr., Count 1, not guilty.

401 The Foreman: That is correct.

The Clerk: And so say you all.

The Court: You are unable to agree, you report, Mr. Foreman, on Count 2?

The Foreman: Yes, sir.

The Court: All right, you may sit down.

Mr. Chapman: Your Honor—

The Court: Do you want the jury polled?

Mr. Chapman: I would like it.

Mr. McAuley: Yes, may the jury be polled?

The Court: Poll the jury.

The Clerk: Members of the jury, listen to your
402 verdict as it stands recorded: As to Vito Giallo, Count 1, [828] you find the defendant guilty?

(All jurors respond in the affirmative.)

The Clerk: Members of the jury, listen to your verdict as it stands recorded: As to Antonino Valenti, on Count 1, you say you find the defendant guilty?

(All jurors responded in the affirmative.)

The Clerk: Members of the jury, listen to your verdict as it stands as to Joseph C. Juliano: You say you find him guilty on Count 1?

(All jurors responded in the affirmative.)

• • •

Motions to Set Aside Verdict 403

[833] Mr. Chapman: Your Honor, at this time I [834] respectfully move to set aside the verdict of guilty on the count of conspiracy, the only count in the indictment, which was returned by the jury against the defendants Giallo and Valenti, and for a judgment of acquittal or in the alternative for a new trial.

I have handed up to your Honor a memorandum of law.

The grounds that are set forth are three in number. And the first is—rather, has reference 404
to the fact that your Honor in my opinion, and I say this most respectfully, erred in failing or refusing to charge request No. 9 which was to the effect that Di Lorenzo, not having pleaded guilty to the indictment, having been called by the Government, having given his testimony, has been effectively given immunity from prosecution on the indictment.

This request becomes important in the light of the testimony which was adduced in the case, and especially as set forth in my memorandum, and which I wish to repeat now in oral argument.

405

The argument that was made by the assistant United States attorney during the summation, which fortunately was taken down, and reference has to be made to it, was that because of the fact that Di Lorenzo, who I think was the pivotal point in the case, was [835] confined in a state prison at Wethersfield, Connecticut, for a state offense, and that the Government under no circumstances would be in a position to assist him.

Of course, it was my argument that he was being rewarded for this testimony, and the purpose of it, as your Honor well knows, was to cast doubt upon

his veracity, since if he had a motive to testify and that motive was to benefit himself, it would soon appear and should have appeared to the jury that that testimony was subject to a great deal of doubt.

The Court: I instructed them specifically with reference to Di Lorenzo's testimony.

Mr. Chapman: With respect to the accomplice—

The Court: To scrutinize it very carefully.

Mr. Chapman: That I have no quarrel with. My sole argument at this time is the effect that your Honor did not see fit—

407 The Court: Just one moment.

(A pause.)

The Court: Now go ahead. Excuse me for interrupting.

Mr. Chapman: That is quite all right.

As I was indicating to your Honor, my claim of error is in the fact that your Honor did not charge as I requested in No. 9. I do not quarrel with anything [836] that your Honor said about accomplice testimony because your Honor covered that, I must say, very adequately, but I think that in view of what occurred, and as is supported by the authorities

408 that I have given your Honor, it was incumbent on your Honor to charge that the Government by calling Di Lorenzo as a witness, after he had persisted in his plea of not guilty, and even on the stand stated that despite the testimony he gave you that he is not guilty, and did so in response to your Honor's inquiry, that under such circumstances they would be precluded from calling him, invading his constitutional rights under the Fifth Amendment, calling him as a witness and—

The Court: They did not compel him because he did not assert any privilege. He wasn't directed by the Court to give testimony.

409

Mr. Chapman: I am coming to that, your Honor. Of course, as your Honor just pointed out, without dwelling too much on the point that they called him and compelled him to incriminate himself—

The Court: They did not compel him to.

Mr. Chapman: I am coming to that. The question then arises, was he compelled?

Of course, the amendment says that a defendant shall not be compelled to give testimony against himself.

[837] Let us see, how did he come down here in the first place? He was brought down here on a writ of habeas corpus ad prosequendum issued by the Court at the request of the United States Attorney, not for the purpose of trying him, but assuming that they brought him down to try him, and he did say that he thought he was on trial, then certainly he should not have been called as a witness if he thought he was on trial or if—

410

The Court: He knew very well that he was not on trial.

Mr. Chapman: I am adverting to what he said at the time. We want to look at this realistically, I believe—

411

The Court: We want to look at it factually.

Mr. Chapman: That is correct, sir. The facts are correct, I believe.

The Court: At the beginning of the trial there was a motion for a severance.

Mr. Chapman: I am coming to that, your Honor.

Way back in 146 U. S., in United States v. Benson, the very thing that the Government did here was acknowledged as being proper. The Government severed a case and called the co-defendant to testify against another defendant. But that was predicated

[838] on what your Honor has adverted. Whether he intelligently, with knowledge and in a proper manner, evinced a waiver of his rights, because if he didn't then the courts say it is nevertheless a compulsion.

It is true that the cases hold, and there are a lot of them, that the right must be asserted by the individual, but those cases result from the fact that the defendants in such cases are appellants; in other words, the defendant coming forward when he is tried and says, "You have invaded my constitutional
413 rights by calling me on another occasion."

That is not the point of my argument. I say that in view of the fact that the request was to charge as set forth that your Honor should have done so, because there was no intelligent waiver. There was nothing said to him at any time, as far as appears in the record, and your Honor knows that that is what we have got to go by. He was never warned of his rights. He came on the stand with the idea that he was being tried, as he stated—

The Court: No, he did not say that he thought he was on trial.

414 Mr. Chapman: I think I can refer you back to that very statement.

The Court: He never stated that he thought [839] he was on trial.

Mr. Chapman: I can refer you back to that very statement almost verbatim of the defendant during his cross-examination when he said, "I think I am on trial now," and I think your Honor—

The Court: He said that rather facetiously, as a result of the examination that was then being conducted.

415

Mr. Chapman: That I could not determine, your Honor, and certainly not in my position.

The Court: Then I could determine it from the statement on cross-examination.

Mr. Chapman: It did not seem to me that there was anything jocular about his remarks.

The Court: Here was a defendant who was represented by counsel, who entered a plea of not guilty, whose case was severed, who appeared as a witness for the Government and asserted no constitutional privilege and voluntarily testified and disclosed acts which had he asserted his constitutional privilege he would not have been obliged to testify to with complete constitutional immunity.

416

There are cases that hold that even though a defendant does not assert his constitutional privilege, under some extraordinary circumstances it might be held [840] that he is granted immunity from prosecution, but those circumstances are such where the defendant is inadequately represented, where he does not know what he is doing, where an unfair advantage is had of him, and where there has been overreaching—in plain words on either the part of the Government or a gross neglect on the part of the Court to protect the rights of the witness.

417

There has been no such circumstance here and this request to charge as submitted is not a correct statement of the law and therefore I denied it, and I feel I was right, and on that ground, if that is the ground to set aside the verdict, I deny your motion.

Mr. Chapman: I am here, of course, to persuade your Honor now that your Honor committed error at that time.

The Court: That is all right.

418 *Motions to Set Aside Verdict*

Mr. Chapman: Now, your Honor—

The Court: I know the purpose.

Mr. Chapman: Your Honor has made certain statements with respect to what cases hold in such instances they are all true, if I were urging on behalf of Di Lorenzo that he should not be tried again, but it is equally true that if he were to get immunity some of those facts should appear.

Now what appears in this record, your Honor? [841] Was he ever warned of his constitutional rights?

419 The Court: He was advised by counsel at the time he entered a plea of not guilty.

Mr. Chapman: What appears in the record?

The Court: The endorsement on the indictment?

Mr. Chapman: That he pleaded not guilty?

The Court: Yes.

Mr. Chapman: And that is all.

The Court: And the presumption that the Court would not accept a plea unless it was regularly entered with a representation by counsel.

Mr. Chapman: Yes, but—

420 The Court: I have not examined it to see whether there was a notice of appearance filed but I presume that there was.

Mr. Chapman: Assuming that there was, your Honor, and I am not saying that, does your Honor believe that the attorney discussed with him his constitutional rights under any circumstances?

The Court: If he did not he was negligent in the performance of his duties.

Mr. Chapman: Your Honor, I do not want to go off the record in any way, but when this man appeared here on August 11th pursuant to the writ

of habeas corpus ad prosequendum, he was assigned to the Legal Aid [842] Society. Mr. Marra went in and talked to him. I was not present. I do not assume to say what was discussed. He came out and he pleaded not guilty and was immediately transported back to Wethersfield, Connecticut.

At the time, audibly so that I could hear—and I happened to be in court just by chance because I had other cases—audibly Judge Sugarman inquired the purpose of bringing him down, because there was no possibility of a trial, and the writ was ad pro- 422
sequendum at that time.

Naturally, the reply was, "I would like to discuss the matter with you at the bench."

I don't know what transpired there, but I can tell, and it is fair to assume from the fact that he was immediately transported back to Wethersfield that he persisted in his plea of not guilty.

The Court: I suppose that is a very fair assumption or conclusion, and I suppose that he had a change of heart when he saw he was left behind by the other defendants when they did not provide counsel for him.

423

Mr. Chapman: Since your Honor is indulging in an assumption—

The Court: We are just applying our every day experiences to the facts in this case.

Mr. Chapman: Will you Honor permit me to go a little further?

The Court: Surely.

[843] Mr. Chapman: And I will tell you what happened. Nobody wanted to go up to see Di Lorenzo except Mr. Frank. He went up to see him and he suffered a change of heart because of Mr.

424 Frank's visit, and that is admitted. I mean, we are off the record—

The Court: No, we are on the record.

Mr. Chapman: As between ourselves. I am not talking about this record but I am talking of the record made at the trial.

The Court: Suppose Frank did go up to see him?

Mr. Chapman: I am not quarreling with that. That is part of his duties.

The Court: That is right.

425 Mr. Chapman: But I come back to this: What did he do? You say that he waived his rights by not asserting them. I contend, your Honor, most respectfully, that he was in no position to assert them at that time. He was called in from the anteroom. Thinking he was on trial, he was told to take the stand, he was asked questions and made answers—

The Court: You just made a statement which has no basis in fact, and that is that he thought he was on trial. He did rather facetiously observe during the course of his cross-examination, which was quite vigorous [844] and quite a caustic cross-
426 examination, and very competently conducted—I have no criticism to make of it—

Mr. Chapman: Thank you.

The Court: —as far as the conduct of the attorneys was concerned, it was vigorous and somewhat at times caustic. And this man did make some observations rather facetiously during the course of his examination that he was on trial here. He meant by that, and I gathered that he meant by that that his veracity was on trial here—his veracity as a witness was on trial, but not as to his guilt or innocence being determined by a jury in his absence, when he was not here, when he was not represented

by counsel during trial, and when testimony and proceedings were had day after day in his absence while he waited in the anteroom.

Mr. Chapman: I do not even know that he was there. I think he was downstairs in the detention room.

The Court: Well, he was downstairs waiting to be called out.

Mr. Chapman: And that would indicate that he was waiting to be called for some trial.

Your Honor, may I give you those minutes before you make a decision, because my memory is fairly 428 retentive and I cannot attribute a facetious remark—

The Court: You may give me the minutes but [845] my decision is made now. Your motion is denied now on that ground.

Mr. Chapman: Very well.

Of course, there is a memorandum of law before your Honor and I wanted to point out in addition, before your Honor has ruled, that there is a difference between a defendant and a witness, and that was pointed out only recently by Judge Ganey in Pennsylvania District Court. You will find the pertinent portion of his decision on the fifth page of my memo- 429 randum.

Now I want to address myself again to the case of Wood v. U. S. Of course you can always find a distinction on facts in some of these cases. I know that, your Honor, but I would prefer if you would be good enough to withdraw your categorical denial of my motion on that ground until you have examined some of the authorities that I have given you. I think that they are pertinent and they may be persuasive.

The Court: I have looked at the very learned and carefully prepared memorandum on that point.

Mr. Chapman: Then with your Honor's permission, permit me to proceed to my second point.

Your Honor will recall that during my cross-examination of Ginanatasio, he stated that some time in February of 1950—I believe it was 1950, and if [846] the dates are wrong I will be corrected of course by the record—he seized the Plymouth, the black Plymouth car that belonged to Mrs. Giallo; that he waited until Mr. Giallo appeared on the scene because he could not take the car otherwise, and then told Mr. Giallo he was taking the car. He said he did not arrest him at that time, and very gratuitously added because he was then on bail.

Well, I guess that everybody could see the prejudice in that voluntary and gratuitous remark.

The Court: I could not see any prejudice in it.

Mr. Chapman: Well, your Honor—

The Court: When you say "everybody" you mean everybody.

Mr. Chapman: I must exclude your Honor.

The Court: You include everybody. You heard it and you heard it with a biased mind prejudiced in favor of the defendant. One hearing that with an open mind attaches no importance to it, and I specifically instructed the jury to disregard it, and I asked them then whether it left any impression on them, and they all said no.

Mr. Chapman: Well, your Honor, I cannot for a minute cavil with you and say for one second that it is not so, that my mind isn't biased. Any [847] attorney must of necessity be biased otherwise he would not be doing his duty.

433

The Court: That is part of his job and obligation.

Mr. Chapman: I say to your Honor then that when I said "everybody" I did not only mean—

The Court: You mean everybody at the defendants' counsel table?

Mr. Chapman: No, sir. I meant everybody even those in the audience. Your Honor being in a position of strict neutrality and having had experience and considering that remark to have been innocuous—

434

The Court: I did not attach any importance to it at all personally but as an extra precaution I made inquiry of the jury with respect to it. In the State courts it would not amount to anything.

Mr. Chapman: In the state court we have other precautions which are not given to us here.

The Court: I don't know about that. I think you have as much protection here.

Mr. Chapman: I am not considering the all-embracive situation, but I will say this: Your Honor says that it was innocuous. I felt differently, and as your Honor indicated, properly so because of my advocacy, and I called your Honor's attention to it at once. I asked for a mistrial to be declared.

435

[848] Your Honor undertook to inquire from the jurors, as to which I had no means of saying yes or no, as to whether they would follow your instructions to disregard it, and they all, either collectively or singly, acquiesced in it.

It is my contention now, your Honor, that by doing so, although unwittingly—your Honor, it would be furthest from my intention to charge anything more than the fact that the result of such an inquiry, as has been pointed out only recently, only served to accentuate the situation.

The Court: It depends upon the manner in which the inquiry is made and the circumstances under which it was made.

Mr. Chapman: Well, let me say this to your Honor. I am citing the Tramaglino case in this circuit which was affirmed, but there is a statement made there by the judge who wrote the opinion, and that was based upon testimony which was gratuitously offered on cross-examination by a Government witness of something constituting an offense which was not within the scope of the indictment. Objection was not made at the time that testimony was given but at some subsequent time, and the opinion states this:

437

That an offer was made by the Court to [849] instruct the jury to disregard that statement, just as your Honor did in effect, and at that time the offer wasn't accepted, but despite the fact that an offer was made, despite the fact that that offer, as the opinion says, would only serve to accentuate the very error that had been committed, despite the inadvertency of it, as happened in this case, it was error, and were it not for the fact, says the opinion, that the guilt of these defendants was so overwhelming by other evidence, a reversal would have been had.

438

Now we come down to that very question—

The Court: Mr. Chapman, you do not make the distinction between statements or comments of this nature which are made by witnesses in the course of either direct or cross-examination and unwittingly are made by laymen who are testifying and who are not well versed in the rules of evidence, and statements of this nature which are made by the prose-

cutor and those directly charged with conducting the prosecution.

While a statement of this nature if made by the prosecutor might have justified the withdrawal of a juror and the declaration of a mistrial, a similar statement unwittingly made by a layman, who is testifying during the course of cross-examination, does not warrant the same action from the Court, particularly [850] so where the remark is more or less of an innocuous nature.

There is no statement here as to the details under 440
which he was out on bail; there is no statement here by this witness of the nature of the charge on which he was out on bail; there is no statement here of the witness of any conviction, no statement even of an arrest on a criminal charge. The bail might have been posted in some civil matter where a body execution had been issued or other things. It is innocuous.

Mr. Chapman: May I say, your Honor, then when you speak of a lay witness and say that a statement was innocuous, you must remember that this was Giananastasio, a Government investigator, who was testifying, and that he was far from an ordinary 441
lay witness who does not know when to stop.

The Court: He is not too far removed from being a lay witness.

Mr. Chapman: There is a great difference, I should think, your Honor. And furthermore, when he said that he did not arrest him because he was then out on bail, I daresay, with all humility, your Honor, that the jury could draw no other inference from that, considering the source from whence it came, than [851] that he was out on bail on something that he knew about; that he was qualified as an investigator of the Alcohol Tax Unit and why would

442 *Benjamin L. Lane—For Defendant Juliano—Direct*

not the jury under those circumstances assume that he was out on bail on a charge that he knew about?

The Court: The motion on that ground is denied.

• • •

[873] BENJAMIN L. LANE, called as a witness on behalf of the defendant Juliano, first duly sworn, testified as follows:

Direct examination by Mr. McAuley:

• • •

443 [879] I find that there is no mention at all of an alleged lengthy observation, which Agent Lane swore to that he conducted on February 11, 1950. Then after telling about a lengthy observation on February 11th, he then went on to tell of another lengthy observation on February 14—no, February 13th—and he told us that after those two observations, in effect, then that seemed to him to be enough of probable cause and [880] he applied for a search warrant.

I would like to inquire of the agent further about the lack of anything like that in this alleged observa-
444 tion on February 11th.

The Court: I will let you inquire into that simply for the purpose of permitting you to make a complete record, but I do not see that it is at all material.

Mr. McAuley: All right.

The Court: And I want to say too that I observed this witness as he testified on the trial; I watched him as he gave his evidence, and I was impressed by his honesty and probity. He impressed me as being an extremely truthful, honest and fair witness. I accepted his testimony without any reservation of any kind.

Benjamin L. Lane—For Defendant Juliano—Direct 445

By Mr. McAuley:

Q. Will you tell us, Mr. Lane, what the facts are with reference to the events of February 11th.

By the Court:

Q. Tell us what you did on February 11th with reference to this. A. On February 11th, with Investigator Perkins, I was in a Government car at Highland traffic circle, and about 4:30 p. m. I observed the green van-bodied truck 446
bearing the sign A. Giollanno & Brothers proceeding [881] north on Route 9W from Highland to Kingston.

Investigator Perkins and I then passed this truck and again saw the sign on the side, and drove to Shokan on the Maltbie Hollow Road. I got out of the car. This was after six o'clock when we arrived there. I don't know exactly what time it was, and I walked up the Maltbie Hollow Road and up the Watson Hollow Road, and as I was walking up, this same green van-bodied truck bearing license 138230 passed me.

It was apparently heavily loaded, and it proceeded into the Joseph Juliano premises. It had to shift in a very 447
low low on account of the steep grade.

I observed the light flash on in the corner of the farmhouse which lit up the area. The truck backed up to the red barn on the Juliano farm premises, and then I heard voices and movement about the barn.

I then did not hang around long. I walked back to where Investigator Perkins was parked with the car, and got into the car and left. The truck went in about 6:50 p. m. into the Joseph Juliano premises.

By Mr. McAuley:

Q. Was it through inadvertence or because in your judgment it was unnecessary that you omitted that ob-

servation from the search warrant and from the affidavit? A. I just stated that I saw the truck go into [882] Joseph Juliano premises at 6:50 p. m.

By the Court:

Q. You did not put the various details in it? A. I didn't put in there that I walked half a mile.

The Court: All right.

The Witness: Or got out of the car and went
449 up the hill.

By Mr. McAuley:

Q. Did you put in there that you smelled mash on February 11th? A. Not on February 11th, no.

Q. Did you put in there that you heard motors on February 11th? A. No, I did not.

Q. Did you put in there that you heard the clank of cans on February 11th? A. I did not. I did not stay—I stayed around for about five minutes and then left.

Q. I am not talking about staying around for five min-
450 utes; I am talking about that affidavit. A. In that affidavit I stated that I saw the truck go into the Joseph Juliano premises and saw it—

Q. But you did not put in that affidavit the rest of what you told at the trial you observed, to wit, the smell of mash and motors running— A. On February 13th I returned—

Q. I am not talking about February 13th. Please, [883] I am talking about February 11th. You did not put in that affidavit what you told this Court and the jury you observed with your senses on February 11th? A. I did not tell the Court that I observed anything with my senses outside of my eyes, seeing the truck go into the Joseph Juliano premises on February 11th.

451

Q. Is that your recollection— A. That is my recollection.

Q. Just a moment. Is that your recollection that at the trial just concluded you did not say that you smelled mash on February 11th when you were then at or near the vicinity of the Juliano farm? A. That is the best recollection I have and my recollection is the truth.

Q. I didn't say anything about the truth.

The Court: Do not conduct a little private conversation.

452

Q. Is it your recollection that you did not tell this Court and the jury that on February 11th while you were in the vicinity of the Juliano farm that in addition to smelling mash you heard motors running? A. I didn't.

Q. Is it your recollection that you did not tell the Court and jury that on February 11th you heard thuds? A. I did say that, yes.

Q. Do you recollect anything else that you said [884] about an observation of your senses on February 11th in addition to thuds? A. Outside of the truck backing to the farm door I have no other recollection of saying anything else.

453

Q. Did you put the thuds in your affidavit? A. No, I did not.

Q. Your observations with respect to your senses with the exception of the truck are confined to the day of February 13, 1950; am I not correct? A. Correct.

Q. Now, Investigator Lane, when did you first learn of the name Juliano especially in connection with the fact that Juliano was the owner of those premises? A. Sometime I believe in January or maybe before.

Q. Sometime when? A. Sometime in January or possibly before.

454 *Benjamin L. Lane—For Defendant Juliano—Direct*

Q. Now, directing your attention to the hours between 5 p. m. and 1 a. m. on February 15, at the time you were in the living room in the evening, did you or any other agent or investigator in your presence question Lango, Cutugno or Bosco? A. Lango and Cutugno could not speak English.

Q. Bosco could? A. Bosco could, yes, sir.

The Court: What has this got to do with the legality of the search warrant?

[885] Mr. McAuley: I make the point in my memorandum, your Honor, assuming that the search
455 was valid here, based upon the affidavits sufficiently to spell out probable cause, that the conduct of the agents with respect to the papers seized from Juliano was not legal.

The Court: In what respect?

Mr. McAuley: In respect of constituting an exploratory search of the sum total of a man's private papers and documents. There was a search warrant for evidence alone. It was a search for contraband.

The Court: The testimony was that these papers were lying openly exposed on a shelf of the desk and in view of anybody who entered into this living
456 room or dining room where the secretarial desk was located. I accept that testimony as being correct, and if the defendant Juliano's testimony was contrary, I reject it as improbable and untruthful. Juliano impressed me as an untruthful and perjurious witness.

Mr. McAuley: Does your Honor—

The Court: I did not regard any of his testimony as being truthful and I do not do so now on this hearing.

Mr. McAuley: Does your Honor wish to let me proceed on this question?

The Court: Go ahead. I am going to let you make as full and complete a record as you desire. I [886] am simply indicating my views on the matter.

Mr. McAuley: Yes.

By Mr. McAuley:

Q. Now, excluding yourself, Investigator Lane, were there any other agents to your knowledge who touched or handled the papers that were in that desk sometime between 5 p. m. and 1 a. m. on the evening of February 14th and the early morning of February 15th and the early 458 morning of February 16th? A. I cannot answer that.

Q. When you were at the desk were you alone? A. At the time I was, yes.

Q. Can you fix that approximate time? A. Shortly after the arrest of Lango and Cutugno.

Q. When was that, five o'clock, 5:30? A. It was after five o'clock, after the warrant was executed.

Q. Between the hours of 5 and 1 a. m. how many of those total hours, those eight hours, did you spend in the living room at the dwelling? A. I do not know. I was in the still part of the time, back in the living room, and there were a number of other investigators about the area. 459

Q. I know, but I say how long a time— A. I can't answer that question.

Q. The question is, can you tell us approximately [887] how many hours or minutes you busied yourself searching for or examining the papers in the desk?

Mr. Frank: I submit that has already been answered.

The Court: Let him answer it again.

A. I don't recall.

460 *Benjamin L. Lane—For Defendant Juliano—Direct*

Q. Can you tell us whether it was one minute? A. Yes, it was.

Q. Could you give us an approximate notion of how many papers you looked at? A. No, I don't recall. There were numerous papers there.

Q. Are you the one who extracted the five papers which were produced at the trial? A. I extracted some of them.

The Court: When you say "extracted" what do you mean?

Mr. McAuley: Selected.

461 The Court: I am asking the witness.

The Witness: I did not extract any. I picked up papers.

The Court: You mean that you selected papers?

The Witness: I selected the ones that I thought pertinent to the investigation.

The Court: From a pile of papers?

[888] The Witness: Yes.

The Court: Where were they?

The Witness: On a secretarial desk in this combination dining and living room.

The Court: Was the desk open at the time?

462 The Witness: It was.

The Court: And was the shelf down on the desk, the shelf that forms the writing part of the desk?

The Witness: No. No, there was—when I looked at it the papers were on top of the desk. There was no shelf.

• • •

[892] *By Mr. McAuley*:

Q. Investigator Lane, before you selected these five papers that I referred to and which are Government's Exhibits in this trial, you searched for other papers, am I right? A. I handled other papers, yes.

463

Q. You looked at other papers? A. I looked at other papers.

Q. To observe what information if any was on the face of those papers? A. Yes.

Q. Can you tell us to the best of your recollection the nature of some of those other papers that you looked at? A. Oh, some were circulars, some letters, personal letters, I believe, and that's about all.

Q. And birth certificates? A. There may have been but I do not recall whether there were or not.

464

Q. Against these five that you selected how many were there approximately that you rejected?

Mr. Frank: I object to this, your Honor, as irrelevant and immaterial.

The Court: I do not see that it is material, but I am going to allow it.

A. I don't recall how many there were. There [893] were quite a number of papers there and I just selected the few that I thought were pertinent to the investigation.

* * *

465

[901] Q. Going back, after re-reading it carefully again, Investigator Lane, going back to Government's Exhibit 2, your reference to all you know about February 11th, that is contained there in a reference to a notification, am I correct, that you received from somebody else in this trial? A. Yes.

Q. You don't, as I believe you testified before, you don't in that affidavit testify to any personal knowledge or any kind or character or description which you yourself had on February 11th? A. Will you repeat that?

Q. You don't do you, in that affidavit testify to a single iota of personal knowledge with reference to the Juliano

farm or the appearance of a truck within that farm on February 11, 1950? A. No.

Q. Did you see a truck on the Juliano farm on February 11th? A. I did.

Q. Why isn't it in the affidavit?

Mr. Frank: If your Honor please, I object to that.

The Court: Objection sustained.

Q. Can you explain the omission of that observation
467 from the search warrant?

Mr. Frank: Same objection.

The Court: Objection sustained.

• • •

[903] VINCENT P. KING, called as a witness on behalf of the defendant Juliano, being first duly sworn, testified as follows:

Direct examination by Mr. McAuley:

Q. Mr. King, can you tell me whether or not on the
468 evening of February 15, between 5 p.m. or thereabouts and 1 a.m. you were in the living room of the Juliano farm? A. I was in there and in the kitchen and out in the still.

Q. At any time did you search through the papers on the desk? A. I glanced at them; I didn't search for them.

Q. You glanced at some of the papers? A. I saw [904] papers on the desk and I saw Investigator Lane looking at them.

Q. You saw Investigator Lane looking them over? A. Yes.

469

Q. Did you see him searching through the papers? A. I saw him examining some papers, yes.

Q. Did you at all look at some of these papers he was examining or did you confer from time to time? A. He showed me the ones that he thought pertinent.

Q. How long did it take him to find the ones which he thought pertinent, do you know? A. I don't know exactly, no.

• • •

[913] The Court: Mr. McAuley, you know, the evidence in this case left me with the impression that these papers which were taken from the farmhouse were not the personal or private papers of Juliano at the time they were taken on February 15, but that they were papers which were jointly owned by him and those with whom he acted in concert, and that they were in no way private papers, that they had been practically abandoned or turned over to the conspirators and left laying around in this farmhouse.

470

Mr. McAuley: I must take the point of view with reference especially to the septic tank and the [914] others that that is not so because there was nobody at the trial—

471

The Court: Well, I was left with that impression—

Mr. McAuley: —that could be—

The Court: —that these were papers that pertained to the conspiracy, and here they were practically discarded by your man, your defendant Juliano, or turned over to his confederates. My impression was that they had been left laying around—

• • •

472 *Frank Lango—For Defendant Juliano—Direct*

[928] FRANK LANGO, called as a witness on behalf of the defendant Juliano, being first duly sworn, testified as follows:

Direct examination by Mr. McAuley:

• • •

[931] Q. You said that you were brought into the room and that you were handcuffed to the couch. A. Yes, sir.

Q. Was anybody else seated on the couch with you?

473 A. Mr. Joseph Cutugno.

Q. Was the other couch opposite you or diagonally across from you? A. Pardon?

Q. Where was the other couch? A. It was to my right.

Q. When you entered that room was there anybody else sitting on that couch? A. No, sir.

Q. Was there any object on that couch? A. No, sir.

Q. I am going to direct your attention to approximately the first two hours that you were in that room about 5.30 to 7.30. During that time were you questioned by any of the investigating agents? A. No, sir, I wasn't.

Q. Were you questioned at any time from 5 p.m. until

474 1 a.m.? A. No, sir.

Q. By even one agent? A. No, sir.

[932] Q. What did you do? A. Just sat there.

Q. What did Cutugno do? A. Just sat there, too.

Q. At any time between 5 p.m. and 1 a.m. did you leave or were you taken from the living room to any other part of the dwelling house? A. No, sir.

Q. What? A. No, sir.

Q. Are you sure of that? A. Positive.

Q. Were you taken out into the kitchen for food or coffee? A. No, sir.

Q. Were you offered food or coffee? A. No, sir.

The Court: This man has pleaded guilty, has he not?

475

Mr. McAuley: But I am calling him as a witness.

The Court: What has that got to do with this proceeding here now, whether he was fed or was not fed?

Mr. McAuley: I am offering him as affecting the credibility of the witnesses who testified in this case, your Honor.

The Court: Is that the only purpose that you are offering this witness for?

Mr. McAuley: I am offering him as proof of the events that went on in the living room especially with reference to the desk. 476

The Court: Ask him about it then, because if you are offering him simply to impeach the credibility of [933] the other witnesses, I do not believe this man's testimony. He has impressed me as being entirely untruthful and unreliable. I would not believe him on a stack of Bibles.

Q. Now, Mr. Lango, when you entered the living room and after you were seated on the davenport did you observe the desk in the room? A. Yes, sir.

Q. To the best of your ability will you describe that desk? A. It was one of these old type—I don't know what you call them—roll top desks. 477

Q. Did it have a keyhole? A. Yes, sir, it did.

Q. Where on the desk was the keyhole? A. At the bottom of the drawer.

Q. When you entered that room was that desk open or shut? A. It was shut.

Q. It was closed? A. That's right.

Q. Could you see any papers visible? A. No, sir.

Q. On that desk? A. No, sir, I couldn't.

478 *Frank Lango—For Defendant Juliano—Direct*

Q. Were there any holes in the coverings of the desk in which you could see? A. No, sir.

Q. Thereafter did you see any agents approach that desk? A. Pardon?

Q. Thereafter, that is after you went into the living room and were seated on the couch, did you see anyone approach that desk or go toward the desk? [934] A. At about 9 o'clock I did.

Q. What happened? A. Well, a few of the agents came in from the barn and one of the agents made a remark that,
479 if the desk was open, and nobody answered it, and he tried it, and so it was closed, and then he started to pry it open with some kind of an instrument.

Q. Did you see the instrument? A. No, sir, I didn't.

By the Court:

Q. How far away from the desk were you? A. I would say about 8 feet.

Q. What part of the desk did they pry open? A. The center, the door where the lock was.

Q. What door? A. The door on it.

Q. Where was the door located? A. It was one of these
480 old type desks.

Q. Where was the door located? A. Right on top of the desk.

Q. Inside of the desk? A. No, sir, on the outside.

Q. Was it below the desk part? A. The lock was on the ledge of the desk, where the door meets the ledge of the desk.

Q. What color was this desk? A. I believe it was sort of a maple finish.

Q. Do you know whether it was a maple finish? A. No, I am not positive.

[935] Q. Do you know whether it was a mahogany desk? A. No, sir.

481

Q. Or red in color? A. No.

Q. What? A. No.

Q. You are not sure whether it was maple in color, are you? A. No, sir.

Q. You say that it was a roll top desk. Are you sure of that? A. Positive.

Q. Was it a desk that opened up on a ledge? A. No, sir.

Q. With a long shelf? A. No, sir.

Q. You are sure of that? A. Positive.

Q. Did you have the key to that desk? A. No, sir, I did not.

482

Q. Did you have any papers in that desk? A. No, sir.

Q. Did you see a coat there or a jacket? A. No, sir, I did not.

Q. Did you see a coat or a jacket around at any time? A. No, I did not.

Q. An olive drab Navy jacket? A. No, sir.

The Court: Go ahead.

By Mr. McAuley:

Q. What part of the investigator that you say approached the desk, what part of his anatomy was toward you where you sat? A. His side. 483

[936] Q. After a period of time when you saw him at the desk what happened? A. Well, when he got the door pried open it flew up, and he went through the papers there.

Q. You used the word "door." Are you familiar with a door in a china closet or a kitchen closet? A. Yes, sir.

Q. Do you use the word "door" in that sense? A. No, sir.

Q. What do you mean by a door? A. This folding door that was on the desk.

Q. You call it a folding door? A. Yes.

Q. All right, and then what happened? A. He was joined by another agent and just went through the papers.

Q. Do you know the names of these two agents whom you saw at the desk? A. I know the name of one of them.

Q. What is his name? A. One is Mr. King and the other one is the Major.

Q. Major Lane? A. Yes.

Q. At any time during the evening did Mr. King identify himself to you in any particular respect? A. Yes, sir.

Q. What did he say? A. It was about 11 o'clock at night and he told us that our fingerprints and our pictures
485 were to be taken, and he told us, "I am Mr. King and I [937] am in charge of this detail."

Q. How long in all did you see Investigators Lane and King at the desk after it was opened or pried open? A. About twenty minutes or so.

Q. During those twenty minutes that you saw them do anything what were they doing? A. Just looking through the papers.

Q. Will you indicate in what manner they looked through the papers? A. They were just picking them up, reading them and putting them down.

Q. Where were the papers before they had picked them
486 up? A. That I couldn't see too good.

Mr. Frank: If your Honor please, I object to that.

The Court: Objection overruled.

You did not see where the papers were before they picked them up?

The Witness: No, sir.

Q. Could you describe the appearance of the interior of the desk? Did you see the interior of the desk at any time? A. I seen it, yes.

Q. What did it look like? A. It was just one of these pigeon-hole types.

Q. Do you know whether or not the papers that you observed were in the pigeon-holes at any time while you [938] were looking at it? A. No, I couldn't see.

Q. After this 20 minutes or thereabouts was over what happened, what did the agents do, if you know, with respect to the papers? A. No, sir, I don't know.

Q. At any time within the first hour after you entered the room or after that first hour did you see Agent Lane pick up any jacket, a khaki or olive drab jacket, lined with 488
alpaca, which was lying on the davenport, either the one you were sitting on or the one opposite?

• • •

[940] Q. Who purchased the food that you and Cutugno had while you were up there operating the still? A. It was brought up by the truck driver.

Q. Did Juliano ever go out and buy any food for you? A. No, sir.

Q. Who put the telephone in from the house to the barn? Who installed that? A. I did.

Q. Did anybody help you? A. No, sir.

489

[942] The Court: It inquires into this man's probity, but really I think it is a waste of time because I am not impressed at all by his testimony. I feel that he is committing perjury here, as far as I am concerned.

Mr. McAuley: He is a very brave man indeed if he will do that.

The Court: What do you mean? I don't like your remarks, Mr. McAuley. Sit down. I think you are impertinent. You as a former assistant United States attorney ought to be a little more careful in your selection of words.

• • •

490

Notice of Appeal of Defendants, Vito Giallo and Antonino Valenti, et als.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C135-100

—o—

UNITED STATES OF AMERICA

491 *against*

VITO GIALLO and ANTONINO VALENTI, *et als.*,

Defendants.

—o—

NAMES AND ADDRESSES OF APPELLANTS

VITO GIALLO, Federal Detention Headquarters, 427 West Street, New York 4, N. Y.

ANTONINO VALENTI, Federal Detention Headquarters, 427 West Street, New York 14, N. Y.

492

NAME AND ADDRESS OF APPELLANTS' ATTORNEY

HENRY K. CHAPMAN, 291 Broadway, New York 7, N. Y.

OFFENSE

The appellants, together with others, were charged in one Count, with conspiracy to violate the laws of the United States with respect to the possession, distillation and sale of tax unpaid alcohol (Title 18, Section 371, United States Code).

Notice of Appeal of Defendants, Vito Giallo and Antonino Valenti, et als. 493

JUDGMENT

The appellants were each sentenced to the maximum term of five (5) years, on October 31, 1952.

The appellants are now confined to Federal Detention Headquarters, 427 West Street, New York 14, N. Y.

The above named appellants hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated judgments.

Dated: New York, November 3, 1952. 494

HENRY K. CHAPMAN,
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To:

MYLES J. LANE, Esq.,
United States Attorney for the
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New York 7, N. Y.

496

Notice of Appeal of Defendant Joseph C. Juliano

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. C135-100

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

against

497

JOSEPH C. JULIANO,
Defendant-Appellant.

Name and address of appellant: Joseph C. Juliano, New Berlin, New York.

Name and address of appellant's attorney: Harold J. McAuley, 277 Broadway, Borough of Manhattan 7, New York City.

Offense: Title 18, Section 371—Conspiracy (to operate unregistered still).

498 Judgment: That the defendant, Joseph C. Juliano be imprisoned for a term of 18 months, on Count 1, at a place to be selected by the Attorney General.

Defendant, Joseph C. Juliano, is now confined, not on bail, at the Federal House of Detention, West Street, New York City.

I, Joseph C. Juliano, by my attorney, Harold J. McAuley, hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated judgment.

Dated: New York, November 3, 1952.

Notice of Appeal of Defendant Joseph C. Juliano 499

Yours, etc.,

HAROLD J. MCAULEY,
Attorney for Joseph C. Juliano,
Appellant,
Office & P. O. Address,
277 Broadway,
Borough of Manhattan,
New York City 7.

500

501

502

Designation as to Contents of Record

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

C135-100

UNITED STATES OF AMERICA,

Appellee,

against

503

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO,

Appellants.

Sirs:

PLEASE TAKE NOTICE that the appellants above named, Vito Giallo, Antonino Valenti and Joseph C. Juliano, hereby designate the following parts of the Transcript of the Record on Appeal now on file with the Clerk of this Court:

504

A.—Docket entries

B.—Indictment

C.—Motions to dismiss indictment

G.—Verdict of Jury

H.—Motions to set aside verdict

I.—Notices of Appeal

J.—Testimony of Government witnesses

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Joan Jordan, pp. 751 to 753

L.—Testimony of Benjamin L. Lane on motion to suppress, pp. 879 to 889, 892-893, 901, 903, 904, 913-914.

Testimony of Frank Lango on motion to suppress, pp. 931 to 938, 940, 942

and that the said parts will be printed as an appendix to appellants' brief.

Dated, New York, March , 1953.

508 *Designation as to Contents of Record*

Yours, etc.,

HENRY K. CHAPMAN,
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To:

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510 New York 7, N. Y.

No. 347

FILED
SEP 16 1953
HAROLD B. WILLEY, Cle

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

VITO GIALLO, ANTONIO VALENTI and JOSEPH C. JULIANO,

Appellants.

APPENDIX TO APPELLEE'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
MAY 6 1953
A.M. BELL, CLERK
SECOND CIRCUIT

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* * * * *

ARTHUR J. DILORENZO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Frank:

Q. Mr. DiLorenzo, will you speak up so that everyone can hear you? A. Yes, sir.

Q. Mr. DiLorenzo, have you ever been convicted of a crime? A. Yes, sir.

Q. Will you please state when and where and what crime? A. 1937.

Q. What was that crime? A. Transporting untaxed alcohol.

Q. Will you speak up a little louder so we can hear you back here? A. Yes, sir.

Q. Have you ever been convicted of any other crime? A. I am convicted of a crime of manslaughter at present. I am doing three to five at State Prison in Connecticut.

Q. Before you went into the State Prison in Connecticut, what was your occupation? A. Used car salesman.

Q. Did you have any other sidelines or occupation? A.

I did.

Q. What was that? A. I sold some untaxed alcohol.

Q. You said you sold some untaxed alcohol? A. Yes, sir.

Q. Do you know one Vito Giallo? A. I do.

Q. Do you see him here in court today? A. I do.

Q. Will you point him out, please? A. First man on the left.

Mr. Frank: Correctly indicating the defendant Vito Giallo.

Q. Do you know Antonino Valenti? A. Yes, I do, sitting alongside of him.

Mr. Frank: Correctly indicating Antonino Valenti.

Q. Do you know Sam Schifano, Jr.? A. I do.

Q. Will you point him out? A. To the right.

Mr. Frank: Correctly indicating Sam Schifano, Jr.

Q. Do you know either Carlos M. DeJulius or Joseph C. Juliano? A. No.

Q. Around June 1949 did you have occasion to have a conversation with one Vito Giallo? A. I did.

Q. Can you remember the exact date? A. I don't.

Q. Where did you have that conversation? A. At the Academy Wire Products.

Q. Where was that? A. In Pelham.

Q. Can you speak a little louder? A. Pelham.

Q. What was that conversation, if you can recall? A. In purchasing a truck for them.

Q. What did Mr. Giallo say to you and what, if anything, did you say to him, as near as you can remember? A. Well, the type of truck they wanted, and for what they wanted it for.

Q. Did Mr. Giallo tell you what he wanted the truck for? A. Mr. Valenti.

Q. Mr. Valenti told you? A. Yes, sir.

Q. What did he say? A. The type of truck he wanted me to buy for him.

Q. What type of truck did he want you to buy for him? A. Model F-8, Ford truck.

Q. Did he say what he was going to use it for? A. He did.

Mr. Chapman: I would like the conversation without any suggestions, your Honor, if there is any.

The Court: Yes. You say you discussed about the purchase of a truck with Valenti?

The Witness: Yes, your Honor.

The Court: When did you have that conversation with Valenti?

The Witness: That was about June—the latter part of June.

The Court: June what year?

The Witness: 1949, sir.

The Court: Where was that conversation?

The Witness: At the Academy Wire Products.

The Court: Who was there while you talked to Valenti in June 1949?

The Witness: Present at the time?

The Court: Yes, within hearing range.

The Witness: Mr. Giallo, Mr. Valenti, and there was another defendant, that I don't know the name.

The Court: What was said at that conversation, as near as you can remember? What was said by each one?

The Witness: Type of truck that they wanted, and if I could purchase it for them.

The Court: No, no. When you tell us the conversation, tell us, if possible, what Giallo said, and what Valenti said, and what this other defendant said, and whose name you don't know, and what you said.

The Witness: Seeing that I was in the used car business, they asked me—Mr. Giallo—if I could purchase an F8 model truck for him. I told him that I would look around and see if I could get one for him.

The Court: What else was said at that time?

The Witness: At that time? The purpose that they wanted the truck for.

The Court: What was said about the purpose?

The Witness: The purpose, that they wanted a truck that would carry a heavy load.

The Court: Who said that?

The Witness: Both Mr. Valenti and Mr. Giallo.

The Court: Anything else said as to the character and nature of the load?

The Witness: They wanted it to carry a heavy load of sugar.

Q. Was anything else said as to the—what else the truck was to carry? A. For the illegal purpose of alcohol and sugar.

Q. Did you ever have occasion—

Mr. Frank: Withdrawn.

Q. Did you, in fact, buy that truck? A. I did, sir.

Q. I show you Government's Exhibit 3 for identification and ask you whether you have ever seen that exhibit before

and, if so, where? A. I recognize this as the sale of an unregistered motor vehicle.

Q. Where did you see that exhibit before? A. This here?

Q. Yes. A. This was handed to the defendants.

Q. Did you make that out? A. I did.

The Court: When you say this was handed to the defendants, what defendant was it handed to?

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The Witness: Mr. Giallo.

The Court: When was it handed to him?

The Witness: Correction on that. Excuse me, sir. It was handed to Mr. Valenti.

The Court: When was it handed to Valenti?

The Witness: Some time in June, latter part of June.

Mr. Frank: I offer Government Exhibit 3 for identification in evidence.

Mr. Chapman: No objection.

(Government's Exhibit 3 for identification received in evidence.)

Mr. Frank: With your Honor's permission, I would like to read Government's Exhibit 3 in evidence to the jury.

(Exhibit read to the jury.)

Q. When you gave the truck—that Government's Exhibit 3 to the defendants Valenti and Giallo, you knew that the firm Leonardo Giollano was not their name? A. The man that they presented to register the truck under that—

Mr. Chapman: One moment. I object to that as not responsive because that calls for a yes or no answer.

The Court: The question is leading too in addition to that objection. Suppose you ask it directly:

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What were the circumstances under which you gave this defendant Government's Exhibit 3? Where was it, what was said and what was done?

The Witness: The man that the truck was registered under came to me and told me his name was Leonardo Giollanno or Gugliomo and it was registered as such.

The Court: How did he come to you, was he accompanied by anybody?

The Witness: No, sir.

Q. Did you ever see him before? A. I have seen pictures of him.

Q. Do you know what his true name was? A. Now that I have seen his pictures, it is Bosco.

Q. Is that Joseph Bosco? A. Yes, sir.

Q. Did you ever have occasion to see any of the defendants after that day in June 1949? A. Yes, sir.

Q. When was the next occasion that you saw any of the defendants? A. Sometime in July.

Q. And where did you see them on that occasion? A. At the Academy Wire Products.

Q. Who was present on that occasion, if you can recall? A. Mr. Giallo, Mr. Valenti, and two others I can't identify —I don't know their names.

Mr. McAuley: Your Honor, may I interrupt at this point? I object to the presence of certain photo-

graphs within the visible sight of the jury, which are on Mr. Frank's table, which I don't think belong there.

The Court: Yes. They don't belong there, Mr. Frank.

Mr. Frank: I am sorry, your Honor.

The Court: If you intend to offer something in evidence, have it marked for identification. Give it to the clerk. Don't be waving it in front of the jury until they are admitted, if they are admitted in evidence.

(Marked Government's Exhibits 38 to 46 inclusive for identification.)

Q. I show you Government's Exhibit 38 for identification—

Mr. McAuley: Will the Court kindly examine that photograph? The reason for my objection will be observed by your Honor.

The Court: Tear that bottom part off. Paste it on a piece of paper so the back can't be seen. If you want to use it, Mr. Frank, that is the way to use it.

Suppose you do that, if that is necessary, with these photographs during lunchtime.

Mr. Frank: All right, your Honor.

The Court: So that we won't hold up—suppose we take our luncheon recess now. It is about 15 minutes to one. Would one hour be enough today?

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Suppose we come back here at quarter to two?

Today I would like to sit, if possible, until quarter after four. Is that all right with everybody?

Remember my usual admonition to you. Come back, then, at quarter to two.

(Recess to 1.45 p. m.)

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AFTERNOON SESSION

(Jury present.)

ARTHUR J. DILORENZO, resumed the stand.

Direct Examination by Mr. Frank (Continued):

Q. Mr. DiLorenzo, before the luncheon recess I was asking you whether you had ever seen Vito Giallo or Antonino Valenti after that first time in June? A. I did.

Q. When was that? A. Sometime in July.

Q. Where did you see them? A. At the Academy Wire Products in Pelham.

Q. Did you have a conversation with them at that time? A. I did, sir.

Q. If you can recall, will you please tell us what they said to you and what you said to them? A. Our conversation was based on my buying some alcohol from them.

Q. What did they say to you? A. They would sell it to me.

Q. What else did you discuss? A. Price of alcohol and how much it would cost to have it taken up to Connecticut.

Q. What did they say in regard to that? A. We agreed on the price, and they delivered.

Q. What price was it? A. $23.

Q. Do you recall who delivered the alcohol? A. Edward

Shick.

The Court: What do you mean by $23?

The Witness: $23 for a 5-gallon tin.

The Court: $23 for a 5-gallon tin can?

The Witness: Yes.

Q. Who did you say delivered it? A. Edward Shick.

Q. I show you Government's Exhibit 43 for identification and ask you whether the photograph represented thereon is a fair and accurate representation of anyone that you know? A. That is. That is Edward Shick.

Mr. Frank: I offer Government's Exhibit 43 for identification in evidence.

Q. I show you Government's Exhibit—

The Court: Wait a minute.

Mr. Chapman: No objection, your Honor.

The Court: Where is Mr. McAuley?

Mr. McAuley: Right here.

The Court: Excuse me. I didn't see you over there. All right; make yourself comfortable.

(Marked Government's Exhibit 43 in evidence.)

Q. I show you Government's Exhibit 38 for identification and ask you whether the photograph of the man repre-

sented thereon is a fair and accurate photograph of anyone that you met or that you know? A. That is Sam Schifano, Sr.

Q. I show you Government Exhibit 41 for identification and ask you whether—

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Mr. Rader: No objection, your Honor.

The Court: All right.

Q. (Continuing) And ask you whether the man represented on this photograph is a fair and accurate representation of anyone you know? A. That is Mr. Bosco, as he represented himself as Mr. Guglielmo or Giollanno.

The Court: He says that is Bosco's photograph, the man who represented himself as Giollanno. Is that correct?

The Witness: That is correct, yes, sir.

The Court: That is Government's Exhibit 41. Any objection?

Mr. Rader: No objection.

(Marked Government's Exhibit 38 to 41, inclusive, in evidence.)

Q. Will you speak up a little louder? A. I will try to.

The Court: Let us come back to this alcohol you say you bought in July 1949 from Giallo and Valenti. How much alcohol did you buy from them at that time?

The Witness: 300 gallons.

The Court: 300 gallons?

The Witness: Yes, sir.

The Court: That is 60 tins?

The Witness: Yes, your Honor.

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The Court: How did you pay for it, check or cash?

The Witness: Cash.

The Court: Who did you give the money to?

The Witness: To Mr. Valenti.

The Court: When did you give him the money?

The Witness: A couple of days ago after delivery of alcohol.

The Court: Where was it that you gave him the money?

The Witness: At the Academy Wire Products.

Q. Who else was present during this meeting of July when you bought the alcohol? A. At the Academy Wire Products?

Q. Yes. A. Mr. Giallo, Mr. Valenti, Sam Schifano, Jr. and Sr.

Q. And they were— A. And there were a couple of others that I don't recall their names.

Q. Did you ever have occasion to see them after that, after July? A. Yes, I did.

Q. When did you see them next? A. About five or six weeks after.

Q. What happened on that occasion? A. I ordered more alcohol.

Q. Where did you see them? A. At the Academy Wire Products.

Q. What happened on that occasion? A. I ordered more

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alcohol from them.

Q. And did you have a conversation? A. Just a conversation according to the price and what it was going to sell for.

Q. Who was present at that conversation? A. Mr. Valenti, Giallo, and two or three others that I don't know. I haven't seen any pictures of them, I should say.

Q. What was the conversation on that occasion? A. In regards to purchasing alcohol.

Q. State, as best you can, what was the actual conversation? A. I purchased alcohol from them and made arrangements for delivery to Connecticut.

Q. Who delivered the alcohol? A. Edward Shick.

Q. Do you know the vehicle it was delivered in? A. Yes, I do.

Q. What vehicle? A. The Ford that I sold to Mr. Giallo and Mr. Valenti.

Q. How many times after that did you see Mr. Giallo and Mr. Valenti? A. Several times in the course of that year.

Q. Where did you see them? A. At the same occasion, the Pelham—Academy Wire Products.

Q. At Pelham, New York? A. Yes, sir.

Q. What were the conversations on those occasions? A. Same occasions as usual, to purchase alcohol; discuss the

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prices and delivery.

Q. When you were at the Academy Wire Products did you have occasion to see Sam Schifano, Jr. again? A. Yes, I did.

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Q. When was that, if you can recall? A. I saw him on several occasions at the Academy Wire Products.

Q. What was he doing? A. Well, he would either drive up in an automobile and talk with Mr. Giallo or Mr. Valenti and then leave.

Q. Was he ever present when you had these conversations with Mr. Giallo and Mr. Valenti? A. Was he present?

Q. Yes, was he in the room? A. Yes, he was.

Q. When was the last occasion that you saw Mr. Valenti and Mr. Giallo? A. Some time in February of 1950.

Q. What was the conversation you had on that date? A. About purchasing alcohol from them.

Q. Give us the actual conversation, as you can recall? A. Well, I wanted to purchase 300 gallons of alcohol from them and the price that they give me did not agree with what I wanted to pay. So I didn't buy any from them then.

Q. How many times did you buy alcohol, all told, would you say? A. All told?

Q. From Mr. Giallo and Mr. Valenti. A. From the time I encountered them on the truck?

Q. Excuse me. A. From the time that I had contact

with them?

Q. That is correct. A. Oh, six or seven times.

Q. On each occasion was that down at the Academy Wire Products? A. Yes, sir.

Q. When the alcohol was delivered, did you inspect the cans or the tins? A. Did I inspect them?

Q. That is right. A. No, I did not.

Q. Well, did you ever see a stamp, a tax stamp on the containers? A. No, I did not.

Q. Did you ever have any other conversations with the defendants Giallo and Valenti with regards to alcohol?

Mr. Chapman: I must object to that.

A. No.

Mr. Chapman: Time and place.

The Court: Direct the witness's attention to any particular conversation that you want.

Q. I direct your attention to the summer of 1949. A. Yes, sir.

Q. Did you ever have a conversation with Giallo with regard to a still?

Mr. Chapman: I think that is leading and suggestive, your Honor.

The Court: Overruled.

Mr. Chapman: Exception, sir.

A. In regards to a still?

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Q. That is correct. A. No conversation, but at the price that they told me, that the price—

Mr. Chapman: I object. Just one moment.

The Court: Objection sustained. The answer is "No conversation," and the rest is stricken out.

Q. What price did you buy this alcohol at during the summer of 1949? A. The price would vary.

Q. From what to what? A. From 23 to 27, $19.

Q. Per what? What is that? A. For a 5-gallon tin.

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Q. What did you do with the alcohol after you received it? A. I resold it.

Mr. Chapman: I object to that. I don't care what he did with it. I don't think it is pertinent to the issues.

The Court: Overruled.

A. (Continuing) I resold the alcohol in Connecticut.

Q. To whom did you resell it? A. I don't recall the name of the party that I sold it to.

Q. Did you ever have occasion to order alcohol at any other place or at any other time but at the Academy Wire Products?

Mr. Chapman: I object to that, your Honor.

The Court: What has that got to do with this case in connection with these defendants?

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Q. (Continuing) I mean during the months June 1949 through February 1950, from the defendant Giallo or Valenti.

Mr. Chapman: Same objection. It is irrelevant.

The Court: Overruled. He said from these defendants, Giallo or Valenti.

Mr. Chapman: No, he said some other place, I believe. Isn't that his question?

The Court: Did you make any other purchases of alcohol from Giallo and Valenti or Valenti at any other premises other than at the Academy Wire Works?

The Witness: I called them at their home.

The Court: Who did you call up?

The Witness: I could call either Mr. Giallo—

The Court: No, not you could. Who did you call at his home?

The Witness: I called Mr. Valenti at home, and I called Mr. Giallo on different occasions.

Q. Where was that? A. Pardon me?

Q. Where was that? A. Where was what?

Q. When you called, where did you call to? Where were the homes, in other words? A. Mr. Giallo was Brewster. The phone number was 496 or 469.

Q. And Mr. Valenti? A. It was a Glenmore number. I don't recall the number.

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Mr. Frank: No further questions.

Cross Examination by Mr. Chapman.

Q. Mr. DiLorenzo, how old a man are you now? A. Pardon, sir?

Q. How old a man are you? A. 39, sir.

Q. You were tried in 1930—let's see, the date—you were tried in 1937. Were you ever convicted of a crime— A. No, sir.

Q. In 1937 you were about 24 years of age or so. A. I don't recall how old I was, but it was—

Q. That is 15 years ago. You are 39 now. 24 years of age. A. All right. I am slow at arithmetic.

Q. Is that right? A. Yes.

Q. Slow at arithmetic? A. Yes, sir.

Q. Well, where were you convicted of transporting untax paid alcohol? A. In Connecticut, sir.

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Arthur J. DiLorenzo—for Government—Cross

Q. Is that New Haven or Hartford? A. I was tried at Hartford Federal District Court.

Q. You went to jail on that, didn't you? A. I didn't.

Q. Got a suspended sentence? A. Sixty days, suspended.

Q. Between 1937 and the conviction for which you are now serving time in Wethersfield State Prison, did you have any convictions of any crime at all? A. None, sir.

Q. You told us, I think, on direct examination, that you

are now serving a sentence in Wethersfield State Prison in Connecticut? A. Correct, sir.

Q. And that you were convicted of manslaughter and that was the reason you are in jail now? A. Yes, sir.

Q. And that manslaughter consisted of the death—manslaughter was the result of the death of two little children is that right?

Mr. Frank: I object to that.

The Court: You may not go into the details of the crime of which he has been convicted. You may bring it into a general category, if you desire. Was that manslaughter arising out of an automobile accident?

The Witness: No, your Honor.

Q. The manslaughter arising out of the death of two children in the explosion of a still you were operating?

Mr. Frank: I object to that.

The Court: I am not going to permit that.

A. Was it through the—

The Court: No further details.

A. (Continuing) Was it through the explosion of a still?

Q. Yes. A. It was not.

Q. Somebody died as the result of what you did, is that right?

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Mr. Frank: I object to that.

A. Somebody died as the cause of fire.

The Court: Overruled.

Q. And the fire resulted from what— A. From what?

Q. (Continuing) For which you were responsible? A. The State claimed that it was from the still.

Q. Then the still exploded and the fire— A. Still did not explode.

Mr. Frank: I object.

The Court: Objection sustained. I think you have enough of the details on that.

Mr. Chapman: I respectfully except. I think, your Honor, that I should be permitted—

The Court: No, the law is well settled.

Mr. Chapman: Very well.

The Court: The law is well settled that you may not go into the details on that. That testimony is received only as affecting this man's credibility.

Mr. Chapman: Quite so.

The Court: For no other purpose. He has admitted he has been convicted and is doing time now on a conviction for a manslaughter arising out of some still operation. That is all we need to know about that.

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The Witness: Thank you, your Honor.

Q. For which you were responsible, is that right? A. I

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am not responsible.

The Court: Objection sustained.

Q. Did you come here voluntarily, Mr. DiLorenzo? A. Did I come here voluntarily?

Q. Yes. A. I did.

Q. You mean you were not produced as a result of a writ of habeas corpus issued by the United States Attorney? A. I had asked to be brought down here.

Q. When was that that you asked to be brought down here? A. Ten or eleven months ago.

Q. Is that so? A. Yes, sir.

Q. And when were you first brought down here? A. When was I brought down here?

Q. First time? A. I would say around nine months ago.

Q. Was it at that time, nine months ago, when you were brought down for the— A. First time.

Q. —first time? A. Yes.

Q. Nine months ago? A. Yes.

Q. Did you speak to Mr. Frank on that occasion? A. Did I speak—no, I did not.

Q. Did you speak to somebody else in the United States Attorney's office on that occasion? A. Just a minute, sir. I did speak to Mr. Frank.

Q. Nine months ago? A. Yes, I did.

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Q. Did you at that time give him the information about which you testified to on the stand? A. I did.

Arthur J. DiLorenzo—for Government—Cross

Q. Do you remember being brought down here in the second week in August on a writ from Wethersfield State Prison in Connecticut? A. In August?

Q. Second week of August of this year. A. Correct.

Q. You were here in court? A. Yes, I was.

Q. Did you at that time tell the Court that you weren't guilty of the crimes charged in the indictment? A. I did.

Q. And did you tell Mr. Frank at that time that you had no information to give him and had no idea of cooperating with him? A. I did not.

Q. Were you returned to Wethersfield the very same day or the next morning? A. The very same day.

Q. And then from that time on, which was about the 11th or 12th of August, how long a time elapsed before you came down again in this case? A. I came down last Tuesday.

Q. So between August 14th or so and last Tuesday, which would be, oh, October 4th or 5th—no, 7th, I think it was— A. Correct.

Q. —you had no communication with anybody with respect to this case? A. None—may I have that question again, sir?

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Q. Yes, please.

(Question read.)

A. No. I am sorry. I retract that answer. I did.

Q. Yes. And when did you have any communication with somebody with respect to this case? I mean, referring to the District Attorney's office. A. On the 7th of this month.

Q. On the 7th of this month? A. Yes, sir.

Q. Well, I say, between the 7th of this month, which was

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a week ago last Tuesday, a week ago today, as a matter of fact— A. Correct.

Q. —and August 14th or so, did you communicate with or did anybody from the District Attorney's office communicate with you about this case? A. From August 14th to the 7th? No.

Q. When you came down here last Tuesday, that was as the result of a writ that was issued by the United States Attorney to bring you here? A. Yes.

The Court: Issued by the Court.

Mr. Chapman: On application of the United States Attorney.

The Court: I signed the writ.

Mr. Chapman: Issued by the Court upon application of the United States Attorney.

Q. Going back to the first time nine months ago, that

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you say you saw Mr. Frank— A. On or about nine months ago. I am not sure, sir.

Q. I am not going to hold you to that date. A. All right.

Q. On or about nine months ago, when you saw Mr. Frank about this case, as you just told me in answer to my question, did you give him information substantially the same as you have testified to here today? A. I did what?

Q. Was that in his office? A. No, before the grand jury.

Q. Before the grand jury, and there was a stenographer taking down— A. Yes.

Q. —that testimony. After that did you see him at all between the time you finished your testimony before the grand jury and the time that you were here in August? A. Did I see him any other time after my testimony?

Q. Between those dates. A. No, sir.

Q. So when you came down here on the 14th of August you were not previously informed of the fact that you were going to come down, were you? A. I was informed at Connecticut State Prison that I was to be brought here.

Q. That was the first intimation that you had that you were coming down? A. Yes.

Q. When you came here again, in open court, downstairs,

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you said you weren't guilty of any of the charges here, is that right? A. Yes, sir.

Q. You know that this case has been severed against certain individuals; you have been taken out of this case for the purpose of this trial.

Mr. Frank: I object to that, if your Honor please.

The Court: Overruled.

Q. (Continuing) Is that right? A. This case—I had been severed?

The Court: You know you aren't on trial here, don't you?

The Witness: Yes, I do, sir.

Q. And you have never entered any plea to the charges in this indictment which have been brought against you, have you? A. I have pleaded not guilty.

Q. And you have never changed that plea in any way, have you? A. I haven't.

Q. Did there come a time when you were in the office

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of the Alcohol Tax Unit agents, or Mr. Frank, when something was discussed with you as to how much time you would be given unless you would cooperate with the Government? A. How much time I would be given? There was no such statement made, sir.

Q. I beg your pardon? A. There was no statement like

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that made.

Q. Do you recall on any occasion when you were threatened with a sentence of five years maximum?

Mr. Frank: I object to that, if your Honor please. I submit it has already been answered.

The Court: Objection sustained as to form.

Were you ever threatened at any time by anybody—

The Witness: No, sir.

The Court: —concerning your giving of testimony in this case?

The Witness: No, your Honor.

The Court: Were you given any promises by anybody?

The Witness: None whatsoever.

The Court: That you would receive any reward or any punishment for any testimony you gave here?

The Witness: No, sir.

Q. Were you told that, regardless of this case, for your cooperation, assistance would be given you in shortening the term you are now serving for manslaughter? A. No, sir.

Q. You visited at this place, the Academy Wire Products Company? A. Did I visit it?

Q. No, please. I am asking the question. Every one I ask you, you ask me. A. You said if—

The Court: I had difficulty understanding your question too, Mr. Chapman.

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Mr. Chapman: On the contrary, sir.

The Court: Suppose you put it to the witness again.

Mr. Chapman: I am only referring to the fact that every question I ask, he repeats it.

The Court: Put the question to the witness again, please.

Q. You visited at the Academy Wire Products Company, did you? A. I did, Mr. Chapman.

Q. And what kind of building was that business housed in? A. What kind of building? It was a one-story—

Mr. Chapman: That is what I refer to.

A. (Continuing) It was a one-story brick building.

The Court: That is a habit. That is not peculiar.

The Witness: I try to get the—

The Court: I have seen many lawyers do the same thing.

Try not to repeat—

The Witness: All right, your Honor.

The Court: —the question asked of you when you give your answer.

What type of building housed this Academy Wire Works?

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The Witness: A one-story brick or mason finished building.

Q. And did you go into the interior of that building on occasion? A. I did.

Q. And did you find people working there? A. Yes.

Q. And did you see that they were manufacturing nails? A. I did.

Q. And did you see Mr. Valenti employed there on a wire nail machine, or whatever they call it, on occasion? A. I never saw him working there, if that what you mean.

Q. Did you see Mr. Giallo around the premises, working, supervising or— A. I did.

Q. —working on a machine? A. I did.

Q. Is that right? A. I did.

Q. As a matter of fact, to your knowledge you knew that Mr. Giallo was one of the owners of the—or stockholders—of the corporation known as Academy Wire Products Company? A. From their say-so, yes.

Q. And there were other employees there? A. There were two others.

Q. Did you happen to notice how these finished nails were packed when you were in the interior? A. They were packed for delivery, sir?

Q. Yes, in kegs or now? A. They were packed for delivery in kegs.

Q. And that is, well, obviously a heavy product, a heavy

piece of merchandise, isn't it? A. Yes.

Q. When you were first asked on direct examination as to what purpose the truck was—what purpose was indicated as to the use of the truck, you stated, to carry a heavy load. A. Heavy load of sugar.

Q. You didn't say heavy load of sugar at first. A. I did.

Q. You did say that? A. I did say that.

Q. You are positive of that? A. I am positive.

Q. As a matter of fact, didn't you add this "sugar" and the words "illicit alcohol" after you were being interrogated the second or third time? A. I did not.

Q. Was the still you were operating in Connecticut running at the time that these transactions you have testified took place?

Mr. Frank: I object to that question.

The Court: Overruled.

Q. In other words—

Mr. Chapman: I withdraw—

The Court: Overruled. He may answer.

Mr. Chapman: I will make it clearer.

The Court: Don't have to make it clearer. Let us get the answer to the question you asked.

A. It was not.

Q. When did you start operating your still, in the sum-

mer of 1950?

Mr. Frank: I object to that.

The Court: Overruled.

A. I didn't start operating it.

Q. Didn't you have a still? A. I didn't have it.

Q. When did you stop manufacturing alcohol yourself?

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Mr. Frank: I object to that, if your Honor please.
The Court: Overruled.

A. I didn't start operating—manufacturing alcohol myself.

The Court: You were a dealer in it but you didn't manufacture?
The Witness: Yes, sir.
The Court: You would buy it from somebody else who would manufacture it?
The Witness: Yes, your Honor.

Q. Then this fire in the still, where these children were killed, has got nothing to do with you?

Mr. Frank: I object to that question.
The Court: Let him answer.

A. It has to a certain extent. I came into the picture ten days before the building burned.
Q. From a still there?

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The Court: Objection sustained. I have permitted you to go far enough into that. It is a collateral matter, and that is admissible only—
Mr. Chapman: I think it goes directly to credibility.
The Court: He has admitted to you that he has been convicted.
Mr. Chapman: No, he hasn't. He denies that.
The Witness: I deny nothing, sir.
The Court: He has admitted that he has been convicted of the manslaughter and is doing time

for it; that the manslaughter arose in some way in connection with a still. That is the end of it, as far as the facts are concerned.

Q. The testimony you gave, as I recall it, is that you purchased alcohol around five or six occasions during the summer of 1949. A. Yes, sir.

Q. And you disposed of that alcohol to customers of yours in Connecticut? A. A customer.

Q. A customer? A single customer? A. Yes, sir.

Q. And you know—you have told, rather, the grand jury that the purchases were made by you from Mr. Giallo and Mr. Valenti, my clients? A. I did.

Q. Would you kindly wrack your brain and tell us who the single customer was that you sold it to, whose name

you couldn't remember on direct examination?

Mr. Frank: I object to that, if your Honor pleases.
The Court: Overruled.

A. I can recall his first name but not his last name.

Q. Not his last name? A. I don't know his last name.

Q. You wouldn't even know where he is located? A. Where he was located? I do know.

Q. And the transactions you had with him ranged over a considerable period of time? A. I would say seven months.

Q. And you don't know his last name? A. No, sir.

Q. He is a resident of Bridgeport, Connecticut? A. Yes, sir—he was, I say.

Q. Well, he was at the time in the immediate vicinity of where you maintained your home? A. Not in the immediate vicinity, no, sir.

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Q. You knew his address? A. I did.

Q. But you never were able to ascertain his second name? A. I didn't have any occasion for it.

Q. Now, Mr. DiLorenzo, this testimony that you have given here today has been given, I take it, without any promises of any kind? A. None whatsoever.

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Q. You don't expect any reward for it? A. No, sir.

Q. And you knew, however, that the case was being severed against you and you are not being put on trial here?

Mr. Frank: I object.

The Court: Overruled.

Q. (Continuing) Did you know that before you got on the stand? A. I didn't.

Q. It was news to you? You thought you were on trial here? A. Yes, sir.

Mr. Chapman: That is all.

The Court: How about you, Mr. Coven, any questions? Mr.—I don't see Mr. Coven here. Do you represent him?

Mr. Bailey: I am, sir.

The Court: You are representing the defendant DeJulius?

Mr. Bailey: That is right.

The Court: Mr. McAuley, next.

Cross Examination by Mr. McAuley:

Q. I think you used the pronunciation Juliano, did you not, Mr. DiLorenzo? A. I said Jiollanno or Giollanno. I don't recall the name.

Q. You referred to the name which appeared on the truck? A. Yes, sir.

Mr. McAuley: Will you stand up?

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(Defendant Juliano stands.)

Q. Do you know this Mr. Juliano? A. No, I didn't.
Q. J-u-l-i-a-n-o? A. No, sir.
Q. Do you know him? A. No, sir.

The Court: All right. Mr. Rader?

Cross Examination by Mr. Rader:

Q. Mr. DiLorenzo, in July 1949 you were up at the Academy Wire Products Company, is that right? A. Yes, sir.

Q. And that is a company that manufactures nails, as you testified before? A. Yes, sir.

Q. At what time of the day were you up there? A. At noon.

Q. At noon? A. Mid day.

Q. And there were employees around the place? A. I said, yes, there were two employees.

Q. And there was work going on? A. Yes, sir.

Q. And you testified that at that time you saw Giallo and Valenti, is that right? A. I did, sir.

Q. And what did you testify further on direct examination by Mr. Frank this morning before lunch concerning whom else you saw? A. Sir, would you kindly repeat that question?

Q. I will reframe it or withdraw it. You testified originally, in answer to a question by Mr. Frank, that you saw

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Giallo and Valenti and two others you cannot identify, is

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that right? A. Yes, sir.

Q. That was your testimony of a meeting you had in July 1949? A. Yes, sir.

Q. You testified this afternoon, after Mr. Frank resumed the direct examination of you, that you saw Sam Schifano, Jr. and Sam Schifano, Sr. there. A. Yes, I did.

Q. And those are the two men whom you say you couldn't identify earlier today? A. No, sir.

Q. There were other men there? A. Yes, sir.

Q. How many men were there then at that time? A. Well, as I said, I had been there on several occasions.

Q. Mr. DiLorenzo, we are talking about July 1949.

The Court: I understand the witness's testimony —I may be in error but the incident that he said he saw Schifano present was another incident other than the one where he said he saw the two men he couldn't identify.

Mr. Rader: That was later on.

The Court: Am I correct in my understanding?

The Witness: Yes, your Honor.

The Court: And I have a note of it, whether it is correct or not, I don't know, and the jury's recollection will control, that he saw Sam Schifano, Jr. several times at the Academy Wire Works, he saw him drive up and talk to Giallo and Valenti, and that he

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was present at the time of the sales of alcohol, or purchases, were made.

Mr. Rader: That was apparently, your Honor, about five or six weeks after—

The Court: Am I correct in my notes on your testimony?

The Witness: Yes, your Honor.

The Court: All right.

Q. Did you see Sam Schifano, Jr. in July 1949 when you had a conversation with Giallo and Valenti? A. I don't—no.

Q. You don't know? A. I said, no.

Q. You didn't see him then? A. That is right.

Q. Then you testified about five or six weeks later you were up at the Academy Wire Products Company again? A. Yes, sir.

Q. And you had another conversation? A. I did.

Q. With Giallo and Valenti? A. I did, sir.

Q. And I think you testified at that time that there were two or three other men present, whom you didn't know? A. I said that I saw Sam Schifano, Sr. and Sam Schifano, Jr.

Q. Was that five or six weeks after the first conversation? A. Yes, sir.

Q. That is the time you saw Sam Schifano, Jr.? A. I

saw him on several occasions.

Q. We will get to the other occasions, but five or six weeks after the first conversation— A. I would say five or six weeks, sir.

Q. Did you see Sam Schifano, Jr. on the outside of the building or in the building? A. On the outside of the building.

Q. On the outside of the building. Where did you have your conversation with Giallo and Valenti at that time? A. We would hold—at that time?

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Q. On that occasion. A. On that specific time?

Q. On that specific occasion. A. At the entrance to the Academy Wire Products.

Q. At the doorway? A. Rear entrance.

Q. The rear entrance? A. Yes, sir.

Q. In the doorway or outside? A. Outside.

Q. Right outside the doorway, the rear entrance leading into the building? A. Yes, sir.

Q. And you saw Sam Schifano, Jr. around the premises? A. Yes, sir.

Q. Did he participate in any conversation? A. Not with me.

Q. About how far away was he from you and Giallo and Valenti? A. I would say ten feet.

Q. Maybe 15 feet? A. No.

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Q. You also testified that on one occasion after that you saw Sam Schifano, Jr. drive up to the Academy Wire Products Company premises in an automobile, is that right? A. On several of the occasions, I did.

Q. You saw him drive up on several occasions? A. Yes, sir.

Q. You saw him leave? A. Yes, sir.

Q. Did you ever see Sam Schifano, Jr. inside the premises of the Academy Wire Products Company? A. I saw him in the office of Academy Wire Products.

Q. You saw him in the office? A. Yes, sir.

Q. And there were other people in the office, is that right? A. Yes, sir.

Q. Workmen going in and out? A. I wouldn't say workmen. The office is too small to have workmen going through there.

Q. There would be people coming in—a person coming in, a person going out? A. No, they would use the front entrance.

Q. We are talking of the office now. A. And I am answering your question. The office is in the rear of the building.

Q. The office is in the rear of the building? A. Yes, sir.

Q. And from the office you can go out into a back yard,

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is that it? A. Yes, sir.

The Court: This building fronts on Boston Post Road or is it set back on a side street?

The Witness: No, it is set back on a side street.

The Court: About how far in from Boston Post Road does it set?

The Witness: I would say 60 to 75 yards.

The Court: Are there buildings between this Academy Wire Works and Boston Post Road?

The Witness: No, your Honor.

The Court: Any fence or any obstruction there—

The Witness: No, your Honor.

The Court: —to block the view from Boston Post Road in?

The Witness: There is a small gas station but it doesn't block the view of it from the Boston Post Road.

Q. On these several occasions that you saw Sam Schifano, Jr. at the Academy Wire Products Company place of business, did you have any conversation with him at any time? A. With Sam Schifano, Jr.?

Q. Yes. A. No, sir.

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Mr. Rader: I have no further questions.

The Court: Any further questions? All right, next witness.

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Mr. Chapman: Just one question, your Honor.

The Court: Yes, surely, Mr. Chapman.

Further Cross Examination by Mr. Chapman:

Q. Mr. DiLorenzo, if memory serves me right, I think you said you have always protested your innocence on the charges in this indictment, is that right?

Mr. Frank: I object, if your Honor please.

The Court: Overruled. He may answer.

A. In this indictment?

Q. Yes. A. I certainly do.

Q. As a matter of fact, oh, excuse me, and you gave testimony just as you gave it today before the grand jury, you said, nine months ago? A. I did, your Honor, sir.

Q. As a matter of fact, you are guilty of the charges in this indictment? A. I am not guilty of the charge.

Mr. Frank: I object.

The Court: Overruled.

Mr. Chapman: All right.

Mr. McAuley: There is no answer.

Mr. Chapman: I heard it.

Mr. McAuley: Did your Honor overrule the objection?

The Court: I overruled the objection, and the witness answered. He said he is not.

Mr. McAuley: I am sorry, I didn't hear it.

The Court: In other words, you had nothing to do

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with the running of this still?

The Witness: None whatsoever, your Honor.

The Court: Or distilling of the alcohol; you were just a customer?

The Witness: Yes, your Honor.

Mr. Chapman: Your Honor, this charges conspiracy. A customer is as much guilty as either—

The Court: It is for the jury to say whether it was part of the conspiracy. Next witness. It is for the jury to say.

Mr. Frank: If your Honor please, I have one question on redirect.

The Court: All right.

Redirect Examination by Mr. Frank:

Q. When you bought the truck for Mr. Giallo and Mr. Valenti, who paid you? A. Mr. Valenti.

Q. And in what manner were you paid? A. Cash.

(Witness excused.)

* * * * *

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JOSEPH JULIANO, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. McAuley:

Q. Your name is Joseph C. Juliano, is that correct? A. Right.

Q. How old are you, Mr. Juliano? A. 38.

Q. Are you married? A. Yes, sir.

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Q. Do you have a family? A. Yes, sir.

Q. Where were you born? A. Philadelphia, Pennsylvania, 1914.

Q. How long did you there reside? A. Fourteen years. I went to school there.

Q. How far did you go in school? A. Graduated eighth grade.

Q. Then what did you do? A. Moved to New York.

Q. Where in New York? A. Brooklyn, New York.

Q. For how many years generally, not in detail, how many years did you live in Brooklyn? A. About twenty-three years or so, twenty-two years.

Q. When you were a young fellow were you trained, formally or informally, or otherwise, in any trade or craft? A. I beg your pardon?

Q. When you were a young fellow, were you trained, either by schooling or by experience, in any trade or craft?

A. Yes.

Q. What? A. Carpenter.

Q. In your own way, will you please tell the Court and jury where you have worked, what kind of work you have done most of your life, giving as best you can the dates, approximate dates, and periods of time, leaving no gaps? A. Well, when I finished school I came to New York with my family and I went to work in one of my uncle's shops in New York on East 60th Street. He had a furniture shop. I worked there a while. Then I worked in the building line. I can't place the date of that.

Q. Change from fixing approximate dates; how old you were, 19, 20, 21. A. I started working about 15 or 16, something in that neighborhood, and continued on working

in either carpentry or cabinet making right on up until my father died. Then I left the trade and I went into automobile—automotive. I worked on East 38th and Avenue U for the Macru Service Station.

Q. How do you spell that? A. M-a-c-r-u. That represents Mac and Ruby. And I worked for them, oh, several years. I then leased part of their building and went in on my own as repairman.

Q. When was that? A. This was—1932 I was in the C.C.C. I came out of there. I worked about a year. Must

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have been around 1933 or 1934.

Q. What did you do after that? A. In 1934 I got married, and I continued working for Macru, and around 1938 —'38, I think, I was on W.P.A.

Q. How long were you on W.P.A.? A. Oh, about a year—at least a year. Worked at Sheepshead Bay.

Q. What did you do after that? A. On W.P.A. I was back at carpenter work again.

Q. Let us go to the start of the war? A. 1939, 1940 and 1941 I did various gasoline station work—automotive repair work.

Q. Where? A. Oh, Brooklyn and Long Island, for the same outfit, Macru.

Q. At that time where were you living? A. I was living in Brooklyn.

Q. Will you please tell us what happened after that? You are now down to the war years. A. 1941, I went back to Philadelphia for a visit, and I registered for the draft, and I enlisted in the Marines.

Q. How long were you in the Marines? A. I wasn't; they put me in reserve.

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Q. While you were on reserve, where did you work? A. I worked—well, I came back to Brooklyn and went back to work for Cardinal Engineering.

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Q. Where are they located? A. At 700 Hicks Street, Brooklyn, New York.

Q. How long did you work for them? A. I worked for them up until 1944, when I was drafted in the Army.

The Court: What happened to the enlistment in the Marines?

The Witness: They just—they sent me a letter. I wanted to get in and they wouldn't take me because they said I had too much family. So they just gave me—I have a letter that says I can go to the draft board, period, and register.

Q. You were in the Army. How long were you in the Army? A. I was in the Army six months—not quite six months.

Q. Were you honorably discharged? A. Yes, I was.

Q. Thereafter what did you do? A. I was off a couple of weeks, and then I went to work in a gasoline station on Foster and McDonald.

Q. In Brooklyn, New York? A. Yes.

Q. How long did you work there? A. Oh, I stayed there about two months.

Q. What did you do? A. I bought a lease for the 81st Street garage, Brooklyn—Bensonhurst, Brooklyn.

Q. Give us the address carefully. A. 1784 81st Street,

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Brooklyn.

Q. How long did you operate the garage? A. Until nineteen—September 1947.

Q. By this time you were, of course, married and had a family? A. Yes.

Q. Have you at any time up until the point about which I am now questioning you, have you ever at any time been convicted of a state or federal crime? A. No, I haven't.

Q. Have you even been arrested, leaving out this case? A. No, I haven't.

Q. What did you do after February—after February—1947? A. Well, about a year before the lease was up, down at the garage, it was a three-year lease, I bought this farm up in West Shokan.

Q. You bought a farm, is that correct? A. I bought a farm, yes.

Q. Will you tell us the circumstances surrounding the purchase of the farm, from whom you bought it, why you bought it, and what you paid for it.

The Court: What year was this?

The Witness: This was, I believe it was, 1946.

Q. From whom did you buy the farm? A. I bought the farm from Mrs. Maud Playford.

Q. Maud Playford? How do you spell that? A. M-a-u-d

P-l-a-y-f-o-r-d.

Q. What was the purchase price of the farm? A. I bought the farm for $9,000.

Q. How much down payment did you make? A. Why there was a GI mortgage for $9,000.

Q. That is my next question. A. Yes.

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Q. How much cash did you put down— A. To Mrs. Playford, nothing.

Q. You bought it on a GI mortgage? A. That is right.

Q. Of $9,000? A. That is right, bare farm.

Q. Will you tell us what this farm was like? A. 117 acres of rock.

Q. Any dwellings on it? A. Yes.

Q. How many dwellings and what other buildings? A. There was a seven-room house, a large barn, three—triple garage and a tool shed.

The Court: How long had the seventeen—what was it, 117 acres?

The Witness: 117 acres.

The Court: Was that all rock?

The Witness: Just—yes, just a big pile of rock with a little dirt on top.

The Court: How long had it been operated as a farm?

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The Witness: It was one of the old time farms there, but it had been neglected for about seven or eight years.

Q. When you went there was there any stock or produce on the farm? A. No, I bought the stock separately.

Q. When you went there, you took your family, your wife and children? A. Yes, sir.

Q. They attended local schools, I assume? A. Yes.

Q. When you first entered upon the farm, what did you do to earn a living? A. I continued my garage work, and I went home weekends.

Q. What do you mean by that? Where did you continue your garage work? A. I lived at 45 Lake Street, in Brooklyn, and my family went up for once in a while in the summer, and then when I finished up with the garage I moved up there lock, stock and barrel.

Q. When you first went to the farm did you make any attempt to run it as a farm? A. Oh, yes.

Q. What did you do? A. Complete failure.

Q. No, I am not asking you how it came out. What did you do? A. Oh, I bought some cows.

Q. How many? A. Four of them.

Q. How many? A. Four.

Q. From whom? A. From a Mr. Axson, in West Shokan.

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Q. He lives in West Shokan? A. Yes.

Q. By the way, when you say West Shokan, will you tell us what that means, how many homes or families? What is the population of West Shokan? A. Oh, there's very few there. I don't know.

Q. Approximately how many? A. Approximately? Two general stores, and there is a few scattered homes.

Q. How far away was the nearest home to you, where your farm was? A. There was one about 200 feet from the foot of the bridge. Another one about 500-foot down the road.

Q. At the time you bought this farm, Mr. Juliano, did it have any name? A. Oh, yes.

Q. Did you learn it was generally known as So-and-so farm? A. Yes. It was known as the Fine and Dandy Farm.

Q. Do you know when that name was first used in connection with it?

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The Court: How is that—

A. I don't know.

The Court: How is that material? If it is material, go ahead.

Mr. McAuley: Not too material, your Honor.

The Court: If it is even slightly material, go ahead with it.

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Q. What did you do besides having these four cows? A. I had about 200 chickens, some goats.

Q. Did you do any other work? A. Yes, I did side work, such as handy work in the neighborhood.

Q. What do you mean by "handy work"? A. Well, I studied refrigeration.

Q. Where? A. At home.

Q. Did you pick up some smattering of knowledge about it? A. Yes, I studied what I could of books and the rest I did out of practice.

Q. Will you tell us in a brief way what you are able to do in the refrigeration line, alone and unassisted? A. What do you mean?

Q. What are you able to do? Can you fix an icebox? A. Refrigerator, yes, deep freezer, milk cooler.

Q. What are you able to do in the automotive line? A. Well, the automotive line, I like to do just the finer part of it, not the dirty work.

Q. What can you do? A. Ignition, carburetion, greasing.

Q. Anything else? A. Minor repair.

Q. Have you ever owned an automotive workman's tool set? A. Oh, certainly.

Q. Is that something you had accumulated over a period of time? A. I accumulated a whole lot of that in the

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garage. That is the trade proper.

The Court: In connection with your refrigeration work, have you done installation of refrigerators?

The Witness: Yes, sir.

The Court: Have you done piping?

The Witness: Yes, sir.

The Court: Do you know how to couple pipes together?

The Witness: Yes.

The Court: Do you know how to put valves in piping?

The Witness: Yes, sir. It is all sweated work.

Q. Will you state again the date when you entered in possession of the farm, this Fine and Dandy Farm? A. The exact date I don't know.

Q. Approximate date? A. 1946, and I think it was the last half of 1946 because the farm was empty for the winter, and then we came in in the spring.

Q. All right; what were your mortgage obligations per month? A. Fifty-five, roughly $55 a month plus insurance.

Q. At any time after you entered into possession of the farm did there come a time when you had difficulty keeping up with your mortgage payments? A. Oh, yes, quite often.

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Q. I didn't ask you how often. There came a time. All right. Now when did you first have difficulty in keeping up with your mortgage payments? A. When the income from the garage stopped.

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Joseph Juliano—a Defendant—Direct

Q. What garage are you talking about? A. The one in Bensonhurst, Brooklyn.

Q. When was that? A. September of 1947.

Q. Who held the mortgage on your home? A. The Home Savings and Loan of Kingston.

Q. On those occasions when you made payments to that institution, how would you make payments?

The Court: Is this material, Mr. McAuley?

Mr. McAuley: I think it may be.

A. I didn't follow you. What do you say?

Q. Did you mail it? A. No, I took it in in person.

Q. Let me direct your attention at this point—

The Court: Did you have a checking account in those days?

The Witness: No—I did have, but, I mean, it was inactive. That is, the garage was incorporated.

Q. Let me direct your attention, Mr. Juliano, to the date February 15, 1950. Where were you on that date, February 15, 1950? A. I was in New Berlin, New York.

Q. New Berlin? A. New Berlin, New York.

Q. Where is New Berlin, New York, in relation to West

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Shokan, New York? A. One hundred miles north.

Q. For how long a period of time had you been in New Berlin, New York? A. September of 1949.

Q. September 1949? A. That is right.

Q. Do you recall where you were on February 14th? A. Yes.

Q. 1950? A. I was in New Berlins, at the lawyer's office, signing a lease.

Q. What is the name of the lawyer? Do you recall his name? A. No, I don't.

Q. You were signing a lease for what? A. I was signing a lease for a service station in New Berlin.

The Court: Are there many lawyers in New Berlin?

The Witness: No, just a few. The lawyer was in Norwich.

Q. In where? A. Norwich. That is the town.

Q. Was anybody with you? A. Yes, the man who owned the property.

Q. Prior to that date you had made arrangements to buy some kind of gas station in New Berlin? A. Yes.

Q. Do you remember the name of the man from whom you were buying the station? A. George V. Zuhr, representing the Richfield Oil Company.

Q. When prior to February 14—

Mr. McAuley: Withdrawn.

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Q. Where were those tools prior to February 11, 1950? A. They were locked up in the shed, tool shed, and in the triple garage in West Shokan.

Q. Will you state the hour of the day or night when you went to the Juliano Farm from New Berlin, New York, on or about February 11, 1950? A. Oh, sometime in the afternoon, I suppose.

Q. When you got there, what did you do? A. I didn't do anything. I just went inside and went to relax. Made a fire.

Q. Was there anybody in the dwelling? A. Yes, there was two men in there.

Q. Who were the two men? A. A Frank and a young man that couldn't speak English.

Q. Did you have a conversation with those men? A. I didn't have to.

The Court: Did you, yes or no.

The Witness: No, no.

Q. What part of the house were they in?

The Witness: We said words, but no conversation.

Q. What part of the—when you went to the house, did you spend the night there? A. Yes, I did.

Q. Where did you sleep? A. Upstairs in my room.

Q. At any time during the evening hours did you spend any time with our talk to these men? A. Yes.

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Q. At that time, February 14 or 15, where was your wife and where were your three children? A. At New Berlin, at Russet Dairy Farm.

Q. Who is the owner of that farm? A. My brother-in-law, John Russo.

Q. Were your children attending local schools in New Berlin? A. Yes, they were.

Q. State how long a period of time had they been attending school at New Berlin? A. Since September 1949.

Q. When prior to February 14, 1950, had you last been on the premises of the Fine and Dandy or Juliano Farm, whichever you want to call it? A. On a Saturday. It might have been the 11th of February.

Q. 11th of February? A. That is right.

Q. Will you kindly explain the reasons for your presence on the 11th or thereabouts, of February, 1950, on the Juliano Farm? A. Well, when I moved to New Berlin, I just went with my hat and coat, and I went back to West Shokan to pick up tools and equipment that I needed in my new garage.

Q. When you say tools, what do you mean? A. Well, automotive tools, such as toolbox with sockets and wrenches, and open end wrenches, hammers, chisels.

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Q. What did you talk about? A. Nothing in general.

Q. Anything in particular? You talked about nothing? A. There wasn't anything to talk about.

Q. Had you seen these men before? A. I saw one on one occasion before that.

Q. When was that occasion before that? A. Oh, probably two weeks before.

Q. On how many occasions in all, between approximately Labor Day of 1949 and February 11, 1950, on how many occasions were you away from New Berlin, New York, and back at the Fine and Dandy or Juliano Farm? A. Well, around—when I left it in September I went to work in New Berlin, so I didn't come back. I worked subsequent to that.

Q. I didn't ask you that.

The Court: You were asked how many times—

Q. From September—

The Court: Until when?

Q. —until February, including the visit on the 11th, how many times in all? During September, October, November, December and January, during those five months, roughly? A. Maybe three or four or five times.

Q. What was the occasion? A. Always came down to pick up some of my belongings.

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Q. I direct your attention back to approximately Labor Day, 1949. What was your situation at that time with respect to the farming, cows and the goats, or anything else you were doing?

The Court: What has that got to do with this case?

Mr. McAuley: It is an attendant circumstance at the time.

The Court: All right.

A. What did I do with the what?

The Court: How was the farm going around Labor Day?

The Witness: I had to get rid of my stock.

Q. When did you get rid of your stock? A. Spring of 1949.

The Court: Did you plant any—

The Witness: No, winter of 1949. No, I planted nothing.

The Court: You didn't plant anything during the planting season of 1949?

The Witness: No, sir; I worked outside.

Q. You just confused me. You say the winter of 1949. I was asking you about September of 1949. A. I am—I got rid of the stock, and that is all, and the farm I just left there, that is all, period.

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Q. That was September, 1949?

The Court: When did you get rid of the stock?

The Witness: In the winter of 1948-1949. So the farm remained bare after that.

Q. You say the winter of 1948 or 1949. Which is it?

The Court: 1948 to 1949.

The Witness: 1948, 1949, both.

Mr. McAuley: I see. I am sorry.

Q. At that particular time, at or around Labor Day, 1949, were you current or in arrears on your mortgage payments? A. I was always arrears at least a month.

Q. At that time did you determine to do something with respect to disposing of the farm? A. Yes.

Q. What did you do? A. I went to John Cole.

Q. C-o-l-e? A. Yes, of Kingston. He is a real estate broker in Kingston, and I listed the place with him for sale.

Q. Can you fix the approximate time you did that? A. It could have been July or August of 1949.

Q. At or about this time, after you listed the house for sale, did you have a conversation with someone? What happened next? Did you sell the house? A. No, just—

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Q. Did you rent the house or the farm? A. No, just closed it up and went to New Berlin.

Q. When did you close up the house and go to New Berlin? A. Well, around Labor Day of 1949.

Q. Thereafter, after you went to New Berlin, did you have occasion to rent the house? A. No, because I wasn't there, period.

Q. Yes, when you went back, when you went to the house at any time, did you have a conversation— A. When I came back, I came back in the first week of December.

Q. First week of December of what year? A. Of 1949.

Q. At that time did you have a conversation with anyone? A. Well, I came in and there was no light in the place.

Q. Yes, what happened? A. And I was gone or I started going to Kingston, I had a payment to make on the mortgage, and I was getting ready to go to Kingston, and a man came up and told me that the—asked me if I would rent the farm. He heard it was for sale.

Q. Where were you? What were you doing at the time this man came up to you? A. I was there around the premises, collecting tools and packing things.

Q. Where did this man come from, do you know? A.

He walked up the road.

Q. Did he have an automobile? A. Yes, he must have had an automobile.

Q. Did he? I am not asking whether he must have had. A. I don't know.

Q. Did he have an automobile? A. He must have had an automobile. He had to walk; he couldn't get up there with a car.

Q. Did you see an automobile in his immediate presence? A. No, I didn't.

The Court: Was there snow on the ground then?

The Witness: Yes.

The Court: Heavy snowfall?

The Witness: Yes, quite a bit of snow.

The Court: Middle of the winter?

The Witness: Well, December.

The Court: That country up there is pretty cold in December?

The Witness: Yes, first couple of snowfalls we had.

The Court: How much snow would you say was on the ground at the time of this man's visit?

The Witness: Roughly, enough there to prevent a car coming up.

The Court: The road was icy?

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The Witness: Nobody had gone over it, so it was just snow on top of snow.

Q. Would you tell us in full what this man said to you and what you said to him? A. Well, he wanted to know whether I was interested in renting the farm. I said certainly, and he said he had a truck and a car, and he was in the trucking business. He gave me a card.

Q. Do you know—do you remember what his name was, or what name he gave you? A. Well, from what—I mean, as of now, I don't remember what was on the card, but from what I have heard during the trial, I have recalled the name, yes.

Q. What was the name? A. It was Giolanno Trucking, or something or other.

The Court: Giollanno?

The Witness: Giollanno Trucking.

The Court: That is a common Italian name, isn't it, Giollano?

The Witness: Your Honor, I don't think it is an Italian name.

The Court: You have never heard that name before?

The Witness: Well, I heard it, something like it, but I mean, I refer to the spelling. I don't think it exists.

Q. Is Giollano a common Italian name? A. I was born

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Juliano—G-i-u-l-i-a-n-o.

Q. Is Galleno—G-a-l-l-e-n-o, is that a common Italian name? A. Yes, it is.

Q. It means chickens, doesn't it? A. Well, I don't know.

Q. At the time you talked to this man were you hard up for money? A. Well, yes, because I had double overhead.

Q. Did you agree to rent the place to him? A. Yes.

Q. What were the terms, and how much rent did you charge? A. We settled for $65 a month.

Q. When was he supposed to take occupancy? A. He wanted immediate occupancy, immediate possession. I told him he couldn't touch the garages, but he wasn't interested in the garages. He wanted the barn and the house.

Q. At that time were any of the buildings on the premises locked? A. Yes.

Q. Including the dwelling? A. Including the dwelling?

Q. Yes. A. Yes.

Q. What kind of lock was on the dwelling house? A. One you push a key in. Yale lock, I suppose you call it.

Q. Was there a lock on the barn? A. No, just a hook.

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Q. Was there a lock on these garages? A. Yes.

Q. What kind of lock? A. Oh, padlock.

Q. At that time did you give this man any keys? A. Just the one to go into the house, that is all.

Q. At that time you had been how many months away from the farm, up in New Berlin? A. October—

Q. Away from West Shokan and up in New Berlin? A. Two full months.

Q. At that time were there any of your possessions still in the dwelling house, or in the farm house, or in any other dwelling thereon? A. Yes, they were. They were all there.

Q. What? A. Well, tables, and chairs, beds, clothing, tools in the shed.

Q. When you went to New Berlin didn't you take any clothing or bedding or furniture? A. Furniture, no. Clothing, yes.

Q. I take it from the answer that where you went to live in New Berlin was already furnished? A. Yes, it was.

Q. Thereafter, after December, were you paid rent? Were you paid rent? A. After December was I paid rent?

Q. Yes, after you talked to this man? A. Oh, oh, yes.

Q. How many times were you paid rent? A. Once, once

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by the man himself, and another time by the young fellow who was in the house, and that was twice, and that was all.

Q. How much were you paid in all? A. I beg your pardon?

Joseph Juliano—a Defendant—Direct

Q. How much were you paid in all? A. $65 twice. $65 each month.

Q. $130? A. $135.

Q. $130 or $135? A. $130.

By the Court:

Q. Had you ever met this man before? A. No, I had not, sir.

Q. He was an entire stranger to you? A. A complete stranger, yes, sir.

Q. I suppose there weren't many people on the roads or in the vicinity of your home on this day in December, 1949? A. None, sir.

Q. Did you ask him where he lived? A. Well, he said he was in business in Kingston.

Q. Did you ask him where he lived? A. No, I didn't.

Q. Did you ask him what his business was? A. Yes.

Q. Did you ask him where his business was located? A. He said he was from Kingston.

Q. Did you get the street address? A. Oh, no.

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Q. Did you get any references from him? A. Well, he claimed he worked out of New York.

Q. Did you get any references from him? A. No.

Q. Did you ask him whether he could give anybody in the neighborhood as reference? A. No, I haven't.

Q. Did you find out whether or not he had an automobile there? A. He said he had a truck.

Q. Did you see the truck? A. I didn't see a truck. I didn't see a car either.

Q. Did you go outside to look for a truck or a car? A. You can't very well see from the house.

Q. How long after you first met this stranger did you give him the keys to your house? A. I gave it to him immediately upon the payment of his $65.

Q. How long an interval elapsed? A. I would say maybe twenty minutes, twenty-five minutes.

Q. You gave him the keys to the house. When you gave him the keys to the house did you make any writing? A. Yes, on his own card.

Q. Did you keep a copy of it? A. I am sure I had another card because I made out a copy on his own card as a receipt.

Q. Have you that card? A. I looked everywhere. I couldn't find it.

Q. What did you write on the card? A. I just wrote,

—607—

"Received from Mr. Giollanno, $65" for a month's rent.

Q. For a month's rent of what? A. Oh,—that is all, just a month's rent.

Q. What did you tell him? What part of the premises did you tell him he could have? A. He wanted the barn and the house.

Q. Did you tell him he could have the whole barn? A. Yes.

Q. Did you tell him he could have the whole house? A. Well, I told him he couldn't have the whole house. I had rooms up there and my things in it.

Q. What rooms? A. Well, the front room up there, that I had my belongings in there. I told him he couldn't go in there.

Q. Front room where, on the second floor? A. Yes.

Q. Was there a lock? A. There was no lock anywhere.

Q. Did you leave anything of value around that place?

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A. Just maybe a couple of extra pair of pants, that is about all, shirts.

Q. What about the tools and equipment? A. That was all under a lock and key.

Q. Where was that located? A. That was in the triple car garage outside the building.

Q. How much was that equipment worth, your tools and

equipment worth? A. About $5,000 at least.

Q. And was it tools and equipment of the type that could be easily transported or carried away in an automobile? A. Some, yes, and some no. There was a heavy welding machine.

Q. $5,000 worth? A. Oh, yes. You see, when I sold the garage in Bensonhurst, I sold just the lease, and I moved everything out of it.

Q. And you gave the premises over to this man after twenty minutes of talking with him, and on the premises were $5,000 worth of equipment? A. Well, the buildings were all locked. I mean, they are by itself.

The Court: You may continue the examination.

By Mr. McAuley:

Q. Mr. Juliano, I show you Government's Exhibit 30, which is an invoice from the Airdon Company, and ask you if on or about January 24, 1950, you purchased a septic tank? A. I did.

Q. For approximately $30. Where is that septic tank now? A. The septic tank is in New Berlin, New York.

Q. How long has it been up at New Berlin, New York? A. It has been there since I bought it.

Q. Where has it been in New Berlin, New York? A. Where has it been?

Q. Yes. In the ground, hasn't it? A. In the ground, yes, sir.

Q. Where? A. At the Russet Dairy Farm.

Mr. Frank: I object.

The Court: You should have prepared your witness before you put him on the stand. Don't do it while he is testifying. Don't put any leading questions like that. Next question.

Q. When was it put in the ground at New Berlin, New York? A. In the spring of 1950.

Q. Approximately when in the spring? A. Well, when I bought the tank or shortly thereafter, we had a frost and we had snow. We couldn't dig into the ground too easy.

Q. I didn't ask you that. I am just asking you when? I didn't ask you the reason why. A. In March.

Q. When did you put it in? A. At the end of March.

Q. Where was that septic tank physically between January 24, 1950 and the end of March? A. Was in New Berlin in the yard.

Q. When did it arrive in the yard? A. I delivered it there myself.

The Court: You were asked when. When? When did you take it up to New Berlin?

The Witness: January 24, the same day or the day after.

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Q. On what or how did you take it up there? A. On my little pickup truck.

Q. What kind of pickup truck did you have? A. 1948 Ford pickup.

Q. At the time you were operating the 1948 Ford pickup truck, did you ever have another vehicle you could use? A. Yes, I had a ton and a half Dodge truck.

Q. What year or model? A. '38 Dodge.

Q. On or about January 24, where were these two vehicles ordinarily garaged or stored? A. At that particular time one was in wherever I was, and the Dodge was in New Berlin.

Q. Will you state what type of septic tank this is, $30 septic tank? How big is it? A. About three feet in diameter and about five feet high. It looks like a hot water tank.

Q. In terms of persons capacity, what is the ordinary normal use of a septic tank that size? A. Suitable for a one-family house.

Q. Accommodating how many, three or four persons, four or five, or what? A. Five or six.

Q. Has that septic tank at any time to your knowledge been on the premises of the Juliano farm? A. It has not.

Q. I show you Government's Exhibit 31 in evidence and

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ask you if you bought the nine plumbing items— A. I did.

Q. —which are indicated on the invoice? A. I did.

Q. Will you tell me what you did with the two 1-1/12" I suppose, 1-1/2 Milwaukee gate valves, priced at $6.72? What did you do with them after you got them? A. I used them at a water pump.

Q. Where? A. In West Shokan.

Q. Whose water pump? A. I put a—

Q. The question is, whose water pump? A. Louis Tenaro.

Q. What is the address? A. He runs a boarding house in West Shokan. We have no addresses in West Shokan.

Q. Louis Tenaro? A. T-e-n-a-r-o.

Q. You did some work for him? A. Yes, sir, I did.

Q. Will you describe generally the kind of work you did for him on the occasion that you are referring to? A. I had to put water supply in from the brook.

Mr. Frank: May we have the date fixed of this occasion?

The Witness: From the bill. Read it off of there. It is just as good.

Mr. McAuley: The invoice is August 2, 1949.

The Witness: August 2, 1949.

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Q. Was it approximately sometime subsequent to that date? A. Yes, sir, it was.

Q. Tell us generally what is the work you did for Mr. Tenaro? A. Excuse me a minute. Let's have that bill.

Q. Yes (handing paper).

The Witness: There is another one, your Honor.

The Court: The witness says there is another bill that goes with this.

The Witness: There is another one that goes with this, 500 pipe.

Mr. McAuley: It wasn't introduced in evidence, if there is another bill.

The Court: Have you the other bill?

The Witness: I had, but I don't have it any more. And I used these fittings. The two gate valves are check valves. When a pump is pumping, it will pull the water up. When the pump stops, the check valves will hold the water running back.

Q. Don't have to be a plumber for us. Tell us generally; you tell us the name of the person for whom you did the work, and where he lived, and just tell us generally what you did. A. This 9002 Gilmer belt, I don't recall where I used it, but that is probably a refrigerator belt.

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Q. Is there a belt on that invoice? A. Yes, there is.

Q. What kind of belt is that? A. That is a fan belt.

Q. Fan belt? A. Yes.

Q. Do you recall what you did with the fan belt? A. It is a small belt, so it might have been on the same job for the water pump.

Q. To your knowledge, was any one of the nine items which appear on this invoice, Government's Exhibit 31, ever used or installed on any part of the property of the Fine and Dandy or Juliano farm? A. No, sir. All this equipment, all this material, can be seen where it is at, and it is in Louis Tenaro's pump house, from the pump house to the stream.

Q. I show you Government's Exhibit 65 and 67, invoices from the Herzog Supply Company, for solvent, dry cells, bell wire—first, the one for solvent. Can you tell us what kind of solvent that is? A. No, I don't—

Q. Do you recall ever buying any kind of a solvent? Do you know what a solvent is, Mr. Juliano? A. Wait a minute.

The Court: Wait, Mr. McAuley.
Mr. Frank: I object.

A. Wait a minute. This is—yes, I know what this is. This
—614—
is a chemical that goes into the septic tank, and that is where it is.

Q. To destroy waste matter? A. I don't know what it is for.

Q. Did you buy it? A. Yes, I did. There is some more on that. Let's see that.

Q. (Handing paper.) A. Inch and a quarter closed nipple. I bought that for some job. Pipes and nipples, I am used to buying these things.

Q. Did you buy them? A. Yes, I did.

Q. Do you recall where you installed or used the 1¼ nipple for 45 cents? Do you recall where you used that specific nipple? A. I am not sure but, according to the date, it is close to the other one. I might have used it on the same job.

Q. But you aren't sure? A. No, I am not sure.

Q. Did you hear Mr. Bartch testify, the salesman for the Herzog, testify the other day to the effect that he had never seen you or served you prior to the date of January 10, 1950, when he sold you a telephone set? A. Yes.

Q. Was he mistaken in his belief, according to your recollection? A. I think so.

Mr. Frank: I object to that, if your Honor pleases.
The Court: Overruled.

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A. (Continuing) Yes, I know that man as well as I know the other one.

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Q. How many times prior to January 10, 1950, had you been served by Mr. Bartsch? A. At least two years.

Q. You heard him state on this stand, though, that he had never seen you?

The Court: It would be better not to have this witness characterize the testimony of another witness. Let him simply state what—

Q. Will you state what you said to Mr. Bartsch on that occasion and, if you remember, what he said to you in connection with your purchase of that telephone set? A. I didn't say anything. I just ordered what I wanted.

The Court: When did you buy that telephone set?

The Witness: January 10th.

The Court: What year?

The Witness: 1950.

The Court: You had been out of the house, you say, then four or five months—more than that?

The Witness: No, about two months.

The Court: You had been out of the house since September.

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The Witness: Three months is all.

The Court: September, October, November, December is four months, and what is the date of that?

The Witness: First month, tenth day. January 10th.

The Court: Go ahead.

Q. Will you look carefully at each page of Government's Exhibit 36 in evidence—

The Court: Are you through with this exhibit, this telephone business?

Mr. McAuley: I am sorry, I interrupted myself.

Q. Will you tell us what the conversation was with Mr. Bartsch on the day you purchased the telephone set. A. There wasn't any conversation outside of the order.

Q. Will you explain how you came to go and order the telephone and pay for it. A. I went in and I ordered a set of telephones, intercommunication telephones, and I bought them.

Q. Did you buy them for yourself? A. No, I bought them for somebody else.

Q. For whom did you buy them? A. The young fellow that was at the farmhouse.

Q. Prior to the time you bought them did you have a conversation with this fellow? A. Well, he was there and—

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Q. The question is, did you have a conversation. A. Yes.

Q. Please listen to me. A. Yes.

Q. What was the conversation? A. He asked me if I would buy him a set of telephones. I said, "I certainly will," so I did.

Q. Was there any other conversation at that time? A. In respect to telephones? No.

Q. Who was this young fellow, this man you described as a young fellow? A. I know him as Frank or—rather, they called him Frank here. I know him as Jack.

Q. Had you ever seen him before the time he asked you to buy him a set of telephones? A. Yes, I had seen him several times before.

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Q. When?

By the Court:

Q. Was he the same man who rented the place from you? A. No. He claimed he is his son.

Q. Jack? A. Jack claimed he is the son of the old man. I asked him what happened to the old man. He said, "He's just busy," that's all.

Q. How many times after you took this $65 from this old man did you see him? A. The old man?

Q. Yes. A. That is all. That was the first and the last.

I didn't see him there again. I haven't seen him since.

Q. So on the occasion of your next visit to the farm, after you got the first $65, you found somebody in the farm home you didn't know? A. I inquired, "Who are you?" And he told me, he says, the son of this Mr. Giollanno.

Q. You had owned this farm since 1946, hadn't you? A. Yes.

Q. Had you made any improvements on the farm? A. Well, I started some improvements in the house but they were never finished.

Q. How much did you spend on the house or on the barn, about? A. Two hundred, I would say, roughly, $250 in lumber, doors and flooring, which I bought in Brooklyn.

Q. Had you reduced the amount of the mortgage? A. Well, yes, it was going down.

Q. How much had you reduced the mortgage? A. At the time I lost the farm I think it was down to $7,500.

Q. No, at the time you rented this place in September,

1949, how much was the mortgage? A. I don't know. It couldn't have been much less. I would say around $8,000 or $7900.

—619—

Q. Did you figure you had an investment in the farm, an equity there, or money of yours in the farm? A. Well, yes. Well, yes.

Q. That you could get it out, too? A. Yes.

Mr. Chapman: May I interrupt at this time? I think your Honor inadvertently asked him whether he had rented the farm in September, 1949. That is material to some part of my case because the testimony, as I recall it, was in late December.

The Witness: Early December.

Q. Early December? A. That is right.

The Court: Yes, that was his testimony, in the middle of the winter, when snow was on the ground.

Mr. Chapman: Your Honor had said September.

The Court: That is right, December. December is right, and I am mistaken.

The Witness: I did have a conversation—

Q. Are you sure that was December? A. I am sure, because was an event that happened that day.

Q. Are you sure it was in December you rented the farm? A. Yes. You see, I went back in December—

The Court: All right. It was an error, Mr. McAuley.

I interrupted you when you were questioning him about that telephone business.

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By Mr. McAuley:

Q. Mr. Juliano, will you look at Government's Exhibit 36 for identification? Look at it carefully.

(A pause.)

A. What is it?

Q. I ask you if you have ever seen that book—or had you ever seen that book prior to the time several days ago that I showed it to you at the time the Government offered that book in evidence. A. I saw the book.

Q. Where did you see the book? A. I saw the book at the farm.

Q. Where at the farm did you see the book? A. This book was in the desk.

Q. Do you know whose book it is? A. Yes, it is my book.

Q. That is your book? A. Yes, it is.

The Court: Is it in your handwriting?

The Witness: It is my handwriting but I don't get this (indicating). I don't get this (indicating). I know what the rest is.

Q. You are looking, are you, at—these pages aren't numbered— A. I mean, I don't know what it says, but I recognize it as something that I would do, but that I don't—

—621—

Q. I show you what is the last page, unnumbered but the last page, in this loose-leaf folder, and ask you if that

is in your handwriting, just the last page?" A. Yes, the first and last pages.

Q. Let us be certain. A. I mean, there are things that I could use, so it must be me.

Mr. Frank: I didn't quite hear the answer.

The Court: He said there are things there that he could use, so it must be his.

Mr. McAuley: I ask to have this marked for identification.

(Marked Defendant's Exhibit C for identification.)

Q. To make certain, will you take a pencil—

The Court: What?

Mr. McAuley: Let us make certain.

The Court: Make certain of what?

Mr. McAuley: Of the handwriting.

The Court: He says it is his handwriting.

Q. Are you positive, absolutely positive?

Mr. Frank: I object.

A. I can't swear to it. It looks like my writing.

Q. What? A. It looks like it.

Mr. Frank: There is an objection.

The Court: Please. There is no question now. Next question.

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Q. The question was, will you kindly— A. Certainly.
Q. (Continuing) —write on this piece of paper.

Mr. Frank: I object, if your Honor pleases.
The Court: Objection sustained.
Mr. McAuley: Exception.
The Court: The law gives you an exception.

Q. To the best of your knowledge is each— A. I don't know what it is, but, I mean—
Q. I didn't ask you that, please. A. All right, go ahead.
Q. To the best of your knowledge is each and every entry on that last page in your handwriting, or did you write it?

Mr. Frank: I object.
The Court: Objection sustained. You are apparently attempting to have the witness contradict his own testimony, Mr. McAuley.
Mr. McAuley: I am not.
The Court: He testified first that it was in his handwriting. Then he said that it looks like it. What are you trying to do now?
Is that last page in that book in your handwriting? Yes or no?
The stenographer will note upon the record that

—623—

the witness looks at the book, and looks at the last page and, after looking at the last page about a minute, he turns and looks at the first page. Now looking back at the last page.

A. Your Honor, I don't recall none of this.

Q. I asked you a simple question. I will ask you again. Is that last page in that book in your handwriting? Yes or no. A. I will have to say no.

Mr. McAuley: All right.

Q. Will you please write on this sheet of paper—and find out what the truth is—capital R-o-d-s.

The Court: What is that, in pencil, Mr. McAuley?

Mr. McAuley: In pencil. Should be written in pencil.

The Court: Have you a pencil?

The Witness: Yes, sir. How about a pad.

The Court: Let him sit down at the desk there. Step down, step down at the counsel table, while you do your writing.

Mr. Frank: I object to this on the ground—

The Court: Objection overruled. We will take it and the jury will consider it and give it such weight as they determine it is entitled to receive.

Q. Write these words on one line; when I tell you "new line" write a new line: Rods, r-o-d-s. A. R—

Q. R-o-d-s. A. R-o-d-s?

Q. Yes. An abbreviation; a small c—c-a-s-t—and a small dash. A. c-a- —

Q. c-a-s-t, dash and the numeral 5. Under that, next line, small g, gas, g-a-s. A. Is that a word?

Q. g-a-s. A. Oh, yes.

Q. Gas you put in the car.

The Court: You worked in a gasoline station, didn't you? Didn't you?

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The Witness: Yes, sir.

Q. An and sign, not the letters a-n-d, but the sign "and", air, small a, -i-r. And next to that the numerals 8-8 period 5-0. A. What?

Q. 8 point 50. Next line, small letters, the word "small". s-m-a-ll.

The Court: I don't know what your purpose is in this, Mr. McAuley, but haven't you gone far enough with it now?

Mr. McAuley: I think I need one more line for a fair sample.

The Court: For a fair what?

Mr. McAuley: Sample.

The Court: Are you going to call a handwriting

expert?

Mr. McAuley: I am merely trying to assist my client to determine—

Mr. Frank: I object to the gratuitous statement.

Mr. McAuley: Object all you want.—whether this is or is not his handwriting.

The Court: I don't like colloquy between counsel. Stop it. You are trying what?

Mr. McAuley: I am trying to determine the truth. That is the important thing in the trial.

The Court: The witness has testified under oath—

Mr. McAuley: And he is confused under oath.

The Court: Mr. McAuley,—

Mr. Frank: I object to that.

The Court (Continuing): —your statement is im-

proper and the jury will disregard it. It is for the jury to say whether or not he is confused.

Mr. McAuley: It is for the jury.

The Court: I think we have had enough of this writing.

Come back to the stand.

Mr. McAuley: Very well.

(Witness resumes the witness stand.)

Q. Will you look at what you wrote, and will you look at the last page of Government's Exhibit 36 and tell me

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if, looking at what you wrote, refreshes your recollection—

Mr. Frank: I object, if your Honor pleases.

Q. (Continuing) —or that you can say that that is your handwriting. A. I am not a handwriting expert.

The Court: He hasn't indicated his recollection needs refreshing, but we will overrule the objection, and let us see what the answer is. Go ahead. What is your answer?

The Witness: Your Honor, I don't get this at all.

The Court: Don't get what at all?

The Witness: I don't get it.

The Court: Don't get what? You were asked a question. We will have the question read.

The Witness: I am not a handwriting expert.

The Court: You are not asked about whether you are a handwriting expert.

The Witness: I said it looks like—

The Court: What looks like your writing, handwriting?

The Witness: This and this (indicating).

The Court: Indicating the memorandum book in evidence.

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The Witness: I know this is my writing.

The Court: Indicating the memorandum book, Government's Exhibit 36, you now say you have an idea that is in your handwriting?

The Witness: But I don't remember writing it.

The Court: Next question.

By Mr. McAuley:

Q. Will you look at the last page which you have just been looking at, and tell us if you recall when you made those entries. A. I didn't mak any entries like this.

Q. Approximately when you made those entries, and for what purpose? A. I don't recall any entries like this.

Q. Look through the whole book and tell me if you recall making any entries which appear in that book on any one of those pages.

The Court: Mr. McAuley, he has already told you that the entries in the book were in his handwriting.

Mr. McAuley: I am sorry. I confined my question to the last page.

The Court: Before, he said the other pages were in his handwriting. We will ask him again.

Look at the other pages, other than the last page. Are the writings in that book in your handwriting?

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The Witness: Your Honor, it looks like my handwriting. I don't remember writing it.

Mr. McAuley: All right.

The Court: Didn't you say before that you remembered writing some of those entries—

The Witness: No.

The Court: (Continuing) —in the front page?

The Witness: No.

The Court: All right.

Q. I direct your attention specifically to the unnumbered page but which is, in order, the second page, and I direct your attention to several words which are apparently, Italian, "latte"—l-a-t-t-e—"carloni"—c-a-r-l-o-n-i—or "c-ar-b-o-n-i," "carni" and "macaroni". A. That is Italian food.

The Court: Let me see that, will you?

Q. And I ask you if that is in your handwriting.

The Court: "latte" is cheese, is it?

The Witness: It is milk, sir.

The Court: Milk?

Mr. McAuley: "Fromage" is cheese.

The Court: That is French.

What is "faloni"?

The Witness: I don't know. The third one could be meat. That is "macaroni" certainly (indicating).

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Q. The question is, is that in your handwriting, those Italian words? A. No.

The Court: Do you have another question, Mr. McAuley?

Mr. McAuley: Yes.

The Court: I suggest you ask the witness the question, and stop those shenanigans you are doing now.

Mr. McAuley: I am sorry. I must turn the pages.

The Court: Do it in the back. You have had that book around for some time.

Mr. McAuley: Yes, but I haven't lived with it, your Honor. I respectfully except to your Honor's comment.

The Court: That is your fault.

Mr. McAuley: I can't take the Government's word—

The Court: None of these dramatics. Next question.

Mr. McAuley: No dramatics.

Q. Next to the last page, certain numerals—second page from the end— A. I don't know what they are.

Q. Do you know if they are in your handwriting? A. No, I don't.

Q. On February 11th, Mr. Juliano, was there a desk in the dwelling house at the West Shokan farm? A. Yes, there was.

Q. What kind of desk was it? Describe it carefully. A.

What we call a secretary type desk.

Q. How high? A. About four feet from the floor to the very top.

Q. How wide? A. Width, three feet.

Q. Under the top part were there any drawers? A. No, there was just a front door that opened into a sheif, which became the top. Inside there was cubby-holes or pigeon-holes, or similar to what they use in post offices.

Q. Had you from time to time prior to February 11, 1950, had you used that desk? A. Yes.

Q. What did you use the desk for? A. My books and papers, and bills and things I kept in it under lock.

Q. What kind of books and papers? A. See some of them here.

Q. I didn't ask you whether you saw some of them here. A. Well, that is the kind—

Q. Yes, but I want you to describe what kind of papers they were. A. Invoices from supplies that I bought, electric bills, gas bills.

Q. Any personal papers? A. Personal papers?

Q. Family records? A. Yes.

Q. Such as what? A. Birth certificate.

Q. Whose birth certificate? A. Oh, my children.

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Q. Who else? A. That's all.

Q. Anything else?

The Court: Did you take the birth certificates with you when you moved up to New Berlin?

The Witness: No, they were locked up in the desk. I found them later on, though. They were there.

The Court: Suppose we take a five-minute recess.

(Short recess.)

(Jury present.)

Joseph Juliano—a Defendant—Direct

JOSEPH C. JULIANO resumed.

Direct Examination by Mr. McAuley (Continued):

Q. Mr. Juliano, on February 11, 1950, what other possessions or articles were, to your knowledge, in that desk on February 11, 1950? A. I had a pistol in there.

Q. What kind of pistol? A. A little 32.

Q. Did you have a permit for it? A. Yes, I did.

Q. Was the permit in your desk? A. Yes, it was in there with it.

Q. Have any bullets? A. Yes, there was a box of bullets.

Q. How many bullets? A. Full box, I guess.

Q. Approximately how many bullets in a full box? A. I don't know. I think there are 24. I am not sure.

Q. What other articles or possessions were in that desk? A. Lots of bills and papers that I found scattered, and I

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couldn't—I couldn't take inventory.

Q. When you left the farmhouse, dwelling or farmhouse, on October 11, 1950, what was the condition of the desk with regard to whether it was open or closed, locked or unlocked? A. It was locked, and I had the key with me.

The Court: What is the purpose of this, Mr. McAuley? Is the purpose of this to attack the legality of the search and the legality of the seizure of these papers and the execution of the search warrant?

Mr. McAuley: It is. I cannot be honest with the Court and answer no to that, but it is also for the very express purpose—

The Court: I expect you won't give any answer that is not honest.

Mr. McAuley: No, but I cannot partition or separate my two objectives.

The Court: What other objective have you?

Mr. McAuley: To attack the credibility of the Government witnesses in this case.

The Court: All right, I will receive it for that purpose.

Q. Was the desk locked or unlocked at that time? A. Locked.

Q. What kind of lock is on the desk or was on the desk on February 11th? A. A regular desk lock. Keyhole

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like a figure 8.

Q. Like the lock in a piano? A. That is exactly right, like a piano lock.

Q. Where was the key? A. In my pocket.

Q. Where is the key now, if you know? A. I don't know.

Q. Was any part or portion of the wood structure of the desk, or the front enclosure of the desk— A. Yes, the lid—

Q. (Continuing) —missing on February 11th? A. Well, it wasn't missing, but it was broken off.

Q. On February 11, 1950? A. February 11, 1950? No. All intact.

Q. Please listen to me, Mr. Juliano. Did you have a blue Navy jacket? A. A brown one.

Q. Brown Navy jacket? A. Yes, sir.

Q. Sure it wasn't dark green? A. Well, dark green, O.D.

Mr. Frank: I object, if your Honor please.

The Court: I don't think it is so material.

The Witness: There it is there, your Honor. It is brown, I guess.

Mr. McAuley: Put a tag on this.

(Marked Defendant's Exhibit D for identification.)

Q. Showing you Defendant Juliano's Exhibit D for iden-
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tification— A. That's mine.

Q. (Continuing) —did you use that jacket on February 11, 1950? A. Did I use it on February 11th?

Q. February 11, 1950. A. Yes.

Q. You wore it that day? A. Yes.

Q. When you finished wearing it, what did you do with it? A. Took it off and put on my overcoat.

Q. When you took it off, to put on your overcoat, what did you do with that jacket? A. I left it upstairs on my bed.

Q. And your bed is on what floor? A. Second floor.

Q. That was where it was when you last saw it on February 11, 1950? A. Yes.

Q. On February 11, 1950, if you know, were Government's Exhibit 30 for identification, 36 in evidence for identification, 36 in evidence, and, rather, not for identification, 31 and 35, were they in the pockets of this jacket? A. Those papers were in the desk.

Q. Your answer is they weren't in the jacket? A. They weren't in the pockets.

Q. On February 11th? A. Or any time.

Q. You note, of course—

Mr. McAuley: I note for the jury's attention that these bills are—

The Court: I don't want any comment to the jury.

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I have told you that—

Mr. McAuley: All right, I will do it later.

The Court: (Continuing) —at the beginning of the trial. Next question.

Q. When after February 11, 1950, did you next visit the farm at West Shokan, New York? A. On the 16th of February, 1950.

Q. Will you state the circumstances under which you came to the farm on February 16, 1950? A. Well, I signed a lease on the 14th.

Q. What lease? A. For a little service station in New Berlin.

Q. Yes. A. So I came in to get some tools, equipment, and what I thought I was going to need.

Q. What time of day was it? A. It was during the day. I would say noon or a little before.

Q. What time did you leave New Berlin? A. I don't recall. I don't remember. I know it was during the day, and it was daylight.

Q. When you arrived at the farm did you find someone there? A. I didn't arrive at the farm. I got near it.

Q. Tell us what you did. A. There were some men in the street and they stopped me, I was driving a pickup truck, and they said, "Don't go up to the farm. There's

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trouble up there."

I said, "What kind of trouble?"

"Well, State Troopers, Federal investigators, and the biggest distillery you ever saw."

Q. Who were these men, do you know? A. They were neighbors.

Q. Yes, but do you know them by name? A. Let's see. One—while I can—a lot of confusion there, but I recall one—I can't even think of his name.

Q. What did you do? A. Well, panicky, I turned around and took off. I didn't go to the farm.

Q. Where did you go? A. I went home.

Q. When next did you return to the vicinity?

The Court: You mean after you heard that the Federal agents were in possession of your farm and that a still had been found there?

The Witness: Yes, sir. Well, they didn't say any still, but they said there was trouble up there, and they said, "You had better get out of here," so I went.

The Court: Didn't you just tell us that one of your neighbors told you that there was the biggest still that you ever saw up there?

The Witness: Yes, yes, yes. Yes, that's right.

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The Court: So you did know that?

The Witness: Yes, I did know that.

The Court: How far away from the farm were you when you were told this?

The Witness: At the crossroads, Sundown Road and Moonhaw Road.

The Court: How many miles away?

The Witness: Just a little over a mile.

The Court: And you were surprised to hear that, weren't you?

The Witness: Yes, I was.

The Court: And were you angry when you heard it?

The Witness: Well, I don't know whether I was confused or angry, but I just turned around and I went home.

The Court: You went back 100 miles, or 99 miles, approximately, back to New Berlin?

The Witness: Yes, sir.

Q. When that happened, Mr. Juliano, you were enrolled, weren't you, in the public records as the owner of that farm? A. Oh, yes.

Q. There was no secret that you owned that farm? A. Oh, no, no.

Q. Anybody could find out you owned that farm? A. Yes.

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Q. Running away didn't hide your ownership? A. No.

Mr. Frank: I object.

The Court: Overruled.

Q. When did you next go back to the farm? A. When I got home, New Berlin, there was a State Trooper there from the Sydney barracks who advised me to go to West Shokan; that the Federal agents were there and they couldn't leave the premises until they turned it over to a member of the family.

Q. Do you remember the State Trooper's name? A. No.

Q. Had you— A. Wait a minute.

Q. Had you at any time prior to that date been known to and were known by any State Troopers? A. Oh, no.

Mr. Frank: I object to that, if your Honor pleases.
The Court: Overruled.

A. (Continuing) Outside of seeing one or two like that, but I don't know them by name.

Q. Had any State Trooper been previously on your farm? A. Oh, yes, yes. There was an Officer Dunn.

Q. What is his first name? A. Raymond Dunn.

Q. And he had been to your farm prior to this date you speak of? A. Yes.

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Q. When? A. When this elderly man rented the place, I would say about an hour after he left, State Trooper Raymond Dunn and Judge Davis of West Shokan came up to the farm, and they were going to put "No trespassing" posters on the gate and on the house. They knew that the place was closed. And he couldn't quite make it up the driveway, he got stuck, and I advised him that he didn't have to because I had just rented the place. So he says, "Good, good," and that was all.

Q. Was that the extent of your business with the State Trooper and Judge Davis on that date? A. Well, I helped him get out of where he was stuck, anyhow, at the foot of the bridge.

Q. After you were advised by the State Trooper from the Sydney barracks—is that the correct name?—that your presence was desired at West Shokan, what did you do? A. I came in, I believe it was, on a Friday, I came in on a Friday afternoon, and my brother Tino came with me.

Q. Do you recall whether or not it was Friday, February 17, 1950, assuming Wednesday was February 15th as the

day you were last at the farm? Was it two days later or nine days later? A. Wait a minute. No. No, there was a trooper there before that one and he spoke to my wife and

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brother for someone to go down to the farm, that the investigators had to leave and they couldn't leave the place just like that; they had to turn it over to somebody. So my brother took off ahead of me, and when he got there, they turned the farm over to him and they took off.

Q. You got there eventually, is that correct? A. Yes, I got there. I got there eventually that same afternoon or that evening.

Q. Will you tell us whether that was approximately two days later or nine days later? A. I believe it was next day—

The Court: You came—

A. (Continuing) —or two days.

The Court: (Continuing) —after the Government men had left the place?

The Witness: Yes. They had turned the place over to my brother, and then I came in.

Q. When you came there to the farm did you have occasion to look at the living room? A. Oh, yes.

Q. Will you state what you found in the living room? A. Well, everything in an unorderly—there was an unorderly mess there, that was all.

Q. What was the condition of the desk? A. That was broken open. Papers strewn everywhere. Beds, tables,

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chairs were just turned over, and just a complete mess.

Q. Was any part of the desk which had previously been attached to a part of the desk missing? A. Well, there was about, I would say, about two inches of the door broke off, the lock part of it, and it was just laying there.

Q. In the vicinity of the lock? A. It was hanging on by strands.

Q. Thereafter did you go to any of the federal agents pursuant to invitation or request? A. Yes, they asked me to go to Newburgh, that they wanted to talk to me. I went.

Q. You went to Newburgh when? A. I am not too sure of the date but I think it was the following day, Saturday—Saturday or Monday; I don't recall which.

Q. And on that date do you remember the names of the investigators or special agents to whom you talked? A. No, but I know him (indicating). He was there, and the fat fellow was with him. I don't see him here; he was a witness here.

Q. Do you refer to Investigator Lane? A. No, that man there, Lemmler, Marty.

Q. Do you remember the other investigator? A. And his partner, a heavy man.

Q. I think you refer to Investigator Lane.

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Mr. Chapman: Ginanatasio?

The Witness: Yes, Ginanatasio.

Q. Do you remember the gentleman in the Air Force uniform, Major in the United States Air Force, who testified in this trial several days ago? A. Yes.

Q. Was he one of those who were present? A. In Newburgh?

Q. Yes. A. Oh, there must have been about twenty there.

Q. Was he one who talked to you? A. Yes.

Q. You heard him testify, didn't you? A. Yes.

Q. As to what he says you told him at the time? A. Yes.

Q. At that time will you tell me what any one or any of the twenty or thereabouts of the agents said to you, and what you said to them? A. Well, I made a statement, part of which he read, and I told him the circumstances under—how I rented the place to the elderly man.

The Court: Tell us as best you can what you did tell him.

The Witness: Two and a half years ago, your Honor, and I don't remember.

The Court: Tell us the substance of what you told him, if you can.

The Witness: I told him that I rented the place

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to this man. I told him the price.

The Court: If you don't remember, tell us that.

The Witness: We agreed on the price. And they were writing down, as I was talking.

Q. Did Agent Lane, when you heard him here in court, tell substantially and accurately what you told him? A. I don't think so.

Q. Please. I am sorry. I am at fault. A. He was pretty accurate up to the end.

Q. Did he tell substantially the most of what you told him?

The Court: That, of course, calls for a conclusion on the part of the witness.

Q. Will you tell us any part of your conversation, between you and Investigator Lane and any other agent, which was not and has not been testified to in this court by any agent, that happened on that day? A. Well, you see, one of the agents would just keep talking, and he would ask me yes or no, and that is what they would write down. So when they wrote down, oh, several pages, and they asked me to read it, I read it and told him it didn't sound right.

Q. Did you at any time say to Investigator Lane or any other agent, "That statement is right but I will not sign

it because I am in the middle"? A. Oh, no. They told me they were going to put me in the middle.

Q. Who told you that? A. Well, all of them.

Q. You then were known to them as the owner of the farm, weren't you? A. Yes, sir.

Q. Did they threaten you? A. Well, in certain respects, yes.

Mr. Frank: I object.

The Court: Don't ask questions that way, Mr. McAuley. Suppose you come down to the particular conversation and let him give you his version of it.

Q. Did some, or half, or most, or all of the approximately twenty agents talk to you at various times? A. Yes.

Q. Through the hour? A. Yes.

Mr. McAuley: I submit it is impossible to particularize, your Honor.

Q. Mr. Juliano, tell me each and every thing you remember that any agent said at any time that they talked to you in their office? A. As far as the olive drab jacket is concerned, I wanted that back, and they claimed they didn't have it. So while they were talking together—

The Court: Go ahead.

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A. (Continuing) While they were talking together, and arguing, and told me they didn't know from nothing, I gave them a list of more than thirty articles that I claimed I couldn't find.

By the Court:

Q. Did you tell them that on the morning of February 12— A. I told them when they asked me together and—

Q. Excuse me. A. (Continuing) I don't know what date that was.

Q. Did you tell them you were at the farm on the morning of February 12, and left that morning? A. Yes, I was there Saturday, overnight, and left Sunday morning.

Q. Did you tell them you had come on February 10th and stayed until Sunday, February 12th in the morning? A. I probably did, your Honor.

Q. Did you tell them that in the morning you had seen bags of sugar at the barn door? A. No, your Honor. That is what they said.

Mr. McAuley: Take your time, Mr. Juliano.

Q. Did you during that time go into the barn? A. Never. I had no reason.

Q. Did you go into the barn? A. No, I didn't.

Q. Did you detect any odor or any unusual smell about the barn or about the premises, the barn premises? A.

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None whatever, your Honor.

Q. When you were there that time, did you see the telephone on the wall? A. No; I had no occasion to look for anything.

Q. Not in the barn, in the house? A. No, no.

Q. Did you install that telephone? A. I did not.

The Court: All right, Mr. McAuley.

By Mr. McAuley:

Q. Take your time, Mr. Juliano. Tell the jury everything that any agent said to you, any one, of the one, six, twelve or twenty who were there on that day. A. I mentioned a lot of items, and they wrote them down, and they said they were going to be nice enough and look for them and find them and have them returned. They said they had nothing to do with what was missing. They blamed it on the wrecking crew that came in and took the place apart.

Q. Did you make any statements with reference to the desk? A. Yes, I complained about the desk. I wanted my pistol.

Q. What did you say? A. I missed a pistol. I wanted the pistol. And the desk was busted open. I said that's not right, and as a matter of fact, they were kind of mad at me because I didn't think much of them for tearing the place apart.

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Mr. Frank: I move to strike out that last part.
The Court: Let it stand.

A. (Continuing) Well, then, they gave me a speech that all I had to do is just point out a lot of pictures there and I could walk out free, and no arrest or nothing.

Q. Who said that? A. That man (indicating).

Mr. Frank: I move to strike out the answer, "they gave me a speech."

Mr. McAuley: He heard them talking.

The Court: We will let it stand. I don't want any comments.

Mr. McAuley: I am sorry.

A. (Continuing) And if I didn't do that, they would put me in the middle.

Q. Who said that to you? A. Well, I can't point out who said it, but there was a lot of them. I mean, I could remember some distinctive things. So that man there (indicating) got mad at me and wouldn't even talk to me no more when I had hollered for my jacket.

Q. What man? A. That one (indicating). Nobody had it. Nobody knew anything. While we were talking, anyway, I looked in the corner, on the tree, and I said "There is," and it had a tag on the—

Q. Is that the same room in which you had been talk-

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ing for some time? A. Yes. There was some filing cabinets and things there. So they talked it over among themselves and they decided to give me back the jacket. They

said I will have to sign a receipt for it. I said "with pleasure."

Q. Who gave you the jacket? A. That man (indicating) and his partner.

Q. Well, did they say to you, "Joe, is this your jacket?" A. No, I said, "There's my jacket."

Q. And you took it? A. No, he gave it to me after—

Q. When you took it did they say "You had these in the jacket"? A. No, nothing was said about anything in the pockets or otherwise.

Q. Was there anything else that was said that you haven't told us about? A. That is about all. They just—

Q. Did they arrest you on that day? A. No. No, I went home.

Q. What did you go. What do you mean by "home"? A. I went to New Berlin.

Q. Did there come a time when, on your own initiative or by invitation, you again talked to some Treasury agents, investigators or special agents? A. Mr. King was about the only gentleman in the crowd. He asked me if I would come down to the farm, and we made an appointment there at the farm, and, sure enough, Mr. King came up, and

he brought Marty up and his partner and, not Mr. Lane, but there was another gentleman there.

Q. Mr. Ginanatasio? A. No, no. I don't think I seen him in here. I seen him walking around outside.

Q. You remember about Mr. Bender's cow, don't you? A. What?

Q. Mr. Bender's cow? The agent testified he asked you about Mr. Bender's cow got sick, the portly gentleman, short? A. No, I don't mean him—oh, he was there, too.

The Court: Did Mr. Ginanatasio ask you anything about the circumstances surrounding Farmer Bender's cow getting sick?

The Witness: No, no. They didn't mention nothing like that.

The Court: Did you ever hear about Farmer Bender's cow getting sick from water in the stream there?

The Witness: Yes, I did.

The Court: When did you hear?

The Witness: Yesterday.

The Court: Is that the first time?

The Witness: Yes, sir.

Q. You heard in this court Mr. Ginanatasio testify to a conversation that he says he had with you in the presence of a brother investigator? Did you hear him testify?

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A. Yes.

Q. All right. Will you give us your recollection—where did that conversation take place? A. At the farm.

Q. At the farm. Can you fix the approximate time? I believe he said March 3. A. I don't know what date it was but it was in the afternoon.

Q. Well, it was, roughly, about two weeks after? A. I would say yes.

Q. Was anybody with you at the farm? A. Yes, my brother.

Q. Do you know the name of the gentleman who was with Mr. Ginanatasio? A. Yes, Marty.

Q. On that day will you tell us what they said? A. There was a third one there. I am not too sure who he was.

Q. Will you tell us what they said to you by way of statements they may have made, if they made them, or questions they asked, and what replies you gave to them, either to their statements or to their questions? A. I continued complaining about the things that were missing, and Mr. King was just telling me, "Don't worry." He says "We'll find the things for you, and if any one of our men took it, why, we'll make it hard for them," and so on. The rest of them just told me to "Leave well enough alone;"

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if I didn't shut up, I would be in the cooler.

Q. Did anybody say anything to you about your overlooking the fact that the desk was busted into? A. They told me I shouldn't complain because I am lucky they didn't complain everything.

Q. Did you have a power saw? A. Yes, I had a small power saw. I had micrometers I had a number of years.

Q. Were they all taken? A. Yes.

The Court: Where did you keep those?

The Witness: The power saw was underneath the desk. There was a red box and there was micrometers and things in it, and that was locked, the box was locked, but anybody can walk off with it. It is like a little valise.

By the Court:

Q. When you went back after this raid on the 15th or 16th or—17th you went back— A. Yes.

Q. (Continuing) —did you go into the barn? A. No, I didn't go into the barn immediately

Q. How soon? A. You didn't have to because you can look right inside from the outside. The doors were gone. Half the sides were gone.

Q. Did you look in the barn? A. Yes.

Q. What did you see in the barn? A. I couldn't see

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much. There was a little flood in there, and there was boards, and pipes and everything. Was just a tangled mess.

Q. There was nothing that prevented you from going in the barn at that time? A. Oh, no.

Q. You didn't go in to look at it? A. No. I looked at it from the outside. I couldn't go in.

Q. Why not? A. Because everything was just like a big heap by the door too.

Q. Did you go up to the door and put your head in? A. Yes.

Q. You didn't try to go inside the barn to see what the condition of the barn was? A. No, at that time I didn't.

Q. How big was this barn, by the way, in floor area? A. I believe the barn was 40 by 60 up there.

By Mr. McAuley:

Q. Tell us what Mr. Ginantasio and Investigator Lemmler said to you on that occasion of the last talk with you? A. Well, that is all we talked about. They wanted me to tell them who I rented the place to and, if I didn't, what the consequences were, and they were going to involve them, so I told them just what I told everybody else.

Q. All right. Did you at that time—or, were you at

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that time placed under arrest? A. Yes, right then and

there. Mr. Marty there, he said he had a warrant for me and anything I said after that, he said, would be held for record, or held against me, or something.

Q. This he showed you toward the end of your conversation? A. Yes, and then we later got into the car with Mr. King and the rest of them, and we drove into Newburgh, and this was quite a while after. I think it was dark out.

Q. Have you had occasion to talk with Mr. Frank, the assistant United States Attorney, who is at the present time in charge of this case? A. Oh, yes.

Q. On how many occasions? A. Well, every time I came to court, practically.

Q. I don't mean hello and good-bye in the courtroom. Have you been to his room? A. At least six or seven times.

Q. Between what periods of time? A. Well, this was all during last winter and twice this week.

Q. Just answer—and twice when? A. Last week. One, let us see, I came down on the 6th—

Q. Did Mr. Frank have occasion to talk to you about this case? A. Yes.

Q. And did you have occasion to talk to him about it? A. Yes.

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Q. Going back to last week, will you state what the conversation was that you had with Mr. Frank?

Mr. Frank: I fail to see the relevancy of these questions.

The Court: Overruled.

A. Which instance?

Q. Starting with your last conversation with Mr. Frank and working backwards? A. The last conversation with Mr. Frank—

Q. Just a moment. Will you state what Mr. Frank said to you and what you said to Mr. Frank, your last conversation, which you told us took place last week? A. Well, this involved somebody else.

The Court: You were asked to tell the conversation. Do you remember it?

Mr. McAuley: The conversation.

The Witness: Yes.

The Court: Then tell it.

The Witness: Mr. Frank told me that he was glad to hear that I came to my senses. According to my lawyer, he says, I was going to plead guilty.

Q. Mr. Frank told you that? A. Yes, and he said, "You just do that and," he says, "don't worry about nothing." He says, "You walk out of here free and clear." All I had to do was plead guilty.

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Q. This was last week? A. This was Monday. Twice.

Q. That is a week ago— A. Last Monday, yes.

Q. Before that when did you last talk to Mr. Frank? A. Last time when I came down to court in the spring. I don't remember what time it was. I think it was March or April.

Q. What occasion? A. Or even May.

Q. What did Mr. Frank say to you and what did you say to him? A. Same thing, he kept telling me if I pleaded guilty he would see to it that I got out free, otherwise I'm looking at five years.

Joseph Juliano—a Defendant—Cross

Mr. McAuley: You may examine.

Cross Examination by Mr. Frank:

Q. Did you ever work in Brooklyn, Mr. Juliano? A. Did I ever work in Brooklyn?

Q. Yes. A. Certainly.

Q. When did you work in Brooklyn? A. I worked in Brooklyn a good many years prior to going to the farm, prior to 1946.

Q. Did you ever work at 1784 81st Street, Brooklyn? A. Certainly.

Q. Where was that? A. That was the corner of 81st Street and 18th Avenue, Bensonhurst, Brooklyn.

Q. Was there ever alcohol on those premises? A. No.

Q. When did you first meet Vito Giallo, Mr. Juliano?

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A. Right in court.

Q. When was that? A. Oh, I met him in court when we—I think it was an indictment or something.

Q. Mr. Juliano, you stated that you rented the premises out in the early part of December, is that correct? A. Yes.

Q. And you rented those premises to a man L. Giollanno, is that right? A. That is right.

Q. And he gave you a business card? A. That is right.

Q. You took that business card and perhaps another one, is that right? A. Yes.

Q. And you kept one of them and you gave him one back? A. Yes.

Q. You put a receipt—you put on the back of that business card, "Received $65 rent"? A. That is right.

Q. Mr. Giollanno told you that he worked out of Kingston, is that right? A. That he worked out of Kingston.

Q. That is correct? A. Yes.

Q. He said he did a lot of work in New York? A. Yes.

Q. Did you look at that business card? A. In what respect? Certainly I looked at it.

Q. Did you look at it? A. Of course I looked at it.

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Q. Did you read what was on it? A. Giollanno. There was a phone number there, and there was a New York address.

Q. There was a New York address? A. That is right.

Q. That did not seem strange to you in any way, did it? A. No.

Q. He told you he worked—that he was in business in Kingston, is that right? A. That is right.

Q. Yet there was a New York address on the card? A. That is right.

Q. In December, after you rented the farm, when was the next time you returned to the farm? A. In December?

Q. Yes. A. Well, there were several occasions when I returned.

Q. Who was present when you returned? A. There was this Jack fellow.

By the Court:

Q. How soon— A. (Continuing) I believe you people know him as Frank.

The Witness: I beg your pardon?

Q. How soon after you rented the farm was your next visit to the farm, how many days later or weeks later? A. I would say about three weeks later. Maybe before. Two weeks or three weeks later.

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Joseph Juliano—a Defendant—Cross

By Mr. Frank:

Q. And so that would be about the latter part of December, perhaps, maybe the first of January? A. Well, no, I think I was there a little before that. I think it was before Christmas.

Q. Before Christmas? A. Yes.

Q. So then you rented the farm in the first week of December? A. First week of December, that is what I said.

Q. You didn't get any references, you said, is that right? A. No, I didn't.

Q. You left a power saw in the house, is that right? A. Yes.

Q. You left the micrometer in the house? A. Yes.

Q. What other thing of value did you leave in the house? A. There was—I don't think anything of great value. There was clothing, pots, pans, dishes, that sort of stuff, blankets.

The Court: Did you leave the revolver in the desk?

The Witness: Oh, yes, that was in the desk, locked in the desk.

The Court: You left it there even when you rented it to this man whom you hadn't known before?

The Witness: Well, yes.

The Court: You didn't take the revolver out of the desk?

The Witness: No.

Q. You left very valuable papers in the desk, didn't you? A. Yes, I did.

The Court: Did you know that the revolver number was registered on your permit?

The Witness: Yes.

Q. It didn't occur to you to take that stuff with you? A. No.

Q. When did you have your house repaired? A. When did I have it repaired?

Q. Yes. A. Well, I was working on it ever since the date we moved in, but it was never finished.

Q. When you moved to New Berlin, you didn't make any more improvements on it, did you? A. No, I didn't.

Q. Did you ever do anything else for the people that you rented the farm to? A. What do you mean, anything else?

Q. Other than buy the telephone set for them? A. No.

Q. Do you know Mr. Van Wagonin? A. I certainly do.

Q. Did you see him around Christmas of 1949? A. I did.

Q. Where does he live? A. He lives—the one farm below would be, oh, 500 feet below the bridge.

Q. How many are there in your family? A. Three children, my wife and myself, five.

Q. About Christmas of 1949 did you have occasion to see Mr. Van Wagonin? A. Why, sure.

Q. Did you buy anything from him? A. Of course.

Q. What did you buy from him? A. Eggs.

Q. How many eggs? A. I don't know how many.

Q. Would it refresh your recollection if I told you you bought five dozen eggs? A. That is nothing. I generally buy half a case at a time.

The Court: You were asked, does it refresh your recollection if he told you on that occasion you bought five dozen eggs?

The Witness: No, it wouldn't refresh my memory. I know I bought eggs. I don't know what amount.

Q. Do you remember buying one dozen eggs? A. I don't remember what amount. I always bought eggs there, not just that particular day.

Q. Did you buy more than one dozen? A. I might have gotten a half a case.

Q. Did you buy more than one dozen? A. Yes, I bought more than one dozen.

Q. Did you buy more than two dozen? A. I don't recall.

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Q. Could it have been five dozen? A. It could have been ten dozen, it could have been half a case, it could have been five dozen.

Q. Do you say it is less than five dozen? A. No, it is more than five.

Q. Is it more than ten? A. Probably.

Q. Now, what is the price of eggs up there per dozen? A. I have no idea.

The Court: When do you mean, at the time, December, 1949, when he bought from Van Wagonin?

Mr. Frank: At the time when he bought them from Van Wagonin?

A. (Continuing) I don't have any idea.

Joseph Juliano—a Defendant—Cross

Q. I show you Government's Exhibit 36 in evidence and call your attention to the eighth entry on that page, and ask you what that says? A. It says "eggs."

Q. What is the number alongside of it? A. 10 with a circle around it.

Q. What is the number after that? A. 6.00.

The Court: That is in your handwriting?

The Witness: It is the same question as before, your Honor.

The Court: I am asking you.

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The Witness: It looks like my handwriting.

The Court: Do you remember writing it?

The Witness: No.

Q. Do you remember having a conversation with Mr. Van Wagonin at the time you bought these eggs? A. Generally have conversation, yes.

Q. And do you remember Mr. Wagonin expressing surprise? What did you say to—

Mr. Frank: Withdrawn.

The Court: Wait, you asked him, do you remember—do you withdraw that question?

Mr. Frank: Yes.

Q. What did you say to Mr. Van Wagonin and what did he say to you? A. I don't recall. If I went in to buy eggs, I must have asked for eggs.

Q. Does it refresh your recollection that you asked for five dozen eggs? A. I could have asked for five. Probably ten, I don't know.

Q. Well, does that refresh your recollection? A. No.

Q. Would it refresh your recollection that he asked you what you were going to do with all those eggs? A. No. He never asked me questions like that.

Q. Is your recollection refreshed? A. No.

Q. You don't recall that. That could have been part of

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the conversation? A. No, couldn't be. I bought eggs before, and I bought eggs after that, and there was never any question of what I was going to do with the eggs.

Q. Did you say to him that he had a couple of fellows up—that you had a couple of fellows up there, referring to your house, to fix up the place and paper your house? A. No.

Q. Going to the conversations you had with me, do you recall me asking you that— A. No.

Q. (Continuing) —about that conversation? A. No.

Q. And do you recall your saying that that is right, you did have people at your house, fixing up your house? A. No, Mr. Frank. You told me a lot of questions—you quoted a lot of things and then you asked me yes or no.

Q. Do you know one Ralph Bell? A. Certainly I know Ralph Bell.

Q. In the spring of '49 you had already moved up to New Berlin, is that right? A. Spring of 1949?

Q. 1949. A. No, no.

Q. In the spring of 1950 you had already moved back to New Berlin? A. Yes.

Q. When did you move back to New Berlin? A. I don't follow you, "move back to New Berlin".

Q. Moved to New Berlin. A. What question do you

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want there?

Joseph Juliano—a Defendant—Cross

Q. When did you move to New Berlin? A. Labor Day of 1949, which would be September 5th, 6th or 7th.

Q. Now, those eggs you bought at Christmas— A. Yes.

Q. (Continuing) —whom were they for? A. For my family, probably.

Q. What do you mean "probably"? Don't you know? A. No, I don't.

Q. You just go around buying eggs? A. I generally buy anything I see.

Q. Are there any large towns around New Berlin? A. Yes, there is.

Q. What towns are they? A. There is Oneonta, which is 19 miles from New Berlin, and there is Norwich, 14 miles on the other side of it.

Q. Do you happen to know the populations of those towns? A. No. They are fairly large towns.

Q. What kind of area is that? Is it a farm area, rural area? A. New Berlin, you mean?

Q. Yes. A. It is a dairy country.

Q. If you wanted to you could have bought the eggs up around New Berlin? A. Yes.

Q. Aren't they better eggs up there, as a matter of fact? A. I am no authority on eggs.

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Q. Nevertheless you buy them in 10 dozen lots? A. I buy them in half a case, and whole cases, too.

Q. You travel a hundred miles to do that? A. Certainly.

Q. But you are no authority on eggs? A. No.

Q. You wouldn't know a good egg from a bad egg? A. I don't go out just to buy special eggs.

Q. In the spring, 1950, just before this—

Joseph Juliano—a Defendant—Cross

Mr. Frank: Withdrawn.

A. Spring of 1950?

Mr. Frank: I withdraw that question.

Q. After Labor Day, 1950, did you buy any groceries at West Shokan? A. I buy groceries anywhere I pass by.

Q. I asked you the question, did you buy any groceries at West Shokan? Please answer. A. I don't recall.

Q. Do you know one Ralph Bell? A. Ralph Bell? Yes.

Q. Do you say that you didn't buy any groceries at West Shokan? A. I don't say. I don't say I didn't. I just don't recall.

Q. Would it refresh your recollection if I told you that after Labor Day of 1949, you went into Ralph Bell's store and bought some groceries? A. Ralph Bell's store? I didn't know he had a store.

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Q. Is there a grocery store? A. Yes, there is.

Q. Have you ever seen Ralph Bell in the grocery store? A. The Ralph Bell that I know doesn't run a grocery store and he doesn't go in—he lives on the corner where you turn into my farm.

Q. Have you ever known Ralph Bell in any grocery store? A. No.

Q. What is Mr. Bell's wife's name? A. I don't know. I know him. He is an elderly man. He is a carpenter.

Q. Do you know a person by the name of Kathleen Bell? A. No, I don't.

The Witness: The name is Berger.

The Court: You say that after—

The Witness: Shall I tell him? The grocery store.

The Court: I suggest you don't volunteer any information.

The Witness: I mean, I know the person but I don't connect him with a store.

The Court: You impress me as being a rather alert young man. Of course, the jury is to determine whether you are alert.

By the Court:

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Q. But coming back to the house, you say you rented your house around the beginning of December 1949? A. Yes, sir—nineteen—yes, sir.

Q. Now then, you came back about two weeks later, was it? A. I would say about two weeks.

Q. Who did you see at your house when you came back two weeks later? A. This—I know him as Jack, but they call him Frank here.

Q. And you hadn't known him before? A. No, I hadn't known him before.

Q. What time did you come to your house at that time, on that visit? A. I cannot exactly say, but I was in the habit of coming in the later afternoon at all times.

Q. How long did you stay on that occasion? A. I generally stayed overnight and left the next morning.

Q. What time would you leave next morning? A. Oh, daybreak.

Q. During that time did you see anybody else except this one man? A. There was this—well, there was a short fellow with him once but, I mean, I seen him once, and I couldn't even recognize him.

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Joseph Juliano—a Defendant—Cross

Q. We are talking about the first occasion. Was there anybody else? A. Yes, there was another young fellow

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there, which I think—I think he was half asleep.

Q. Did you know him? A. No, and I never saw him again after that.

Q. Did you ask either one of them what they were doing there? A. Yes, I asked Jack what he was doing there and he says, oh, Giuliano is his father.

Q. Did you ask him what he was doing around the place? A. I didn't have any occasion to ask. I said, "You fellows work around here?" He says, "I think we are going to get some sleep now. We got to ride tomorrow morning," that's all.

Q. Did you ask them where they were riding to? A. No.

Q. Did you ask them what they were riding? A. No.

Q. Did you ask them who they were riding for? A. No, no, I had no occasion, your Honor.

Q. How long did you spend, that visit, with them? A. Oh, I generally stayed overnight.

Q. Did you eat a meal with them? A. Well, yes, they always found coffee there.

Q. Did you have supper with them? A. Probably, yes.

Q. Did you bring the food with you?

Mr. McAuley: May I interrupt? I cannot hear

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the answers of the witness.

The Court: Does the jury have any difficulty hearing him? (No response.) Apparently not.

Q. Did you bring any food with you? A. I probably did, your Honor.

Joseph Juliano—a Defendant—Cross

Q. Do you remember whether you did or not? A. No, I don't.

Q. Do you remember whether on that occasion you went out and made purchases of food? A. I never went out and purchased food. If I came in, I brought it with me.

Q. Do you remember whether on that occasion you went out and bought food? A. No, no, your Honor.

Q. Did you eat your breakfast there? A. Yes.

Q. And did you pay anything for your breakfast or pay anything toward your breakfast? A. No, I didn't, your Honor.

Q. During that visit did you go out to the barn? A. I never had any occasion to, no.

Q. Did you at any time, from the beginning of December, when you say you rented the place, until the 17th of February, 1950, after the raid, go out into the barn? A. No, sir, your Honor.

Q. The second time that you came, after you went there, when was that? A. The second time, I think I got the second month's rent. Must have been after the first.

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Q. How long did you stay there? A. Overnight, as usual.

Q. What time did you come? A. I generally came in the afternoon near dusk.

Q. Were the same two men there again? A. Yes—well, not the same two. There was this young fellow who couldn't speak English I seen the second time.

Q. Did you bring food that time? A. I don't recall.

Q. Did you eat any meals with them? A. I don't think so.

Q. Did you go out and look around the premises at all to see how the barn was and the garage? A. No. Mighty cold country there.

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Joseph Juliano—a Defendant—Cross

Q. You didn't go out? A. No, I didn't, your Honor.

Q. You went there, you say, particularly the one time on the 10th of February, was it—9th? A. 11th, I believe, if it was Saturday.

Q. My recollection is that you— A. 10th, probably.

Q. You went there on a Friday and stayed there until Sunday morning, is that correct? Am I correct in that? A. I believe so.

Q. Who was at the place that time? A. The same two fellows.

Q. Did you eat your meals with them during all your

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stay that time? A. I don't remember, your Honor. Maybe I did.

Q. Do you remember whether you did or not? A. I don't.

Q. Did you see them working around the farm? A. No. At each time I saw them they were in the house, just either playing the radio or lounging around.

Q. What time on February 10 was it that you came to the farm? A. I don't recall, your Honor.

Q. What is your best recollection? A. I have a faint idea that I went straight into Kingston and then back to the farm.

Q. About what time? A. I would say about dusk.

Q. That was in February. Must have been around four or five o'clock? A. Yes, about that.

Q. And you stayed all the night of February 10th, did you? A. Yes.

Q. And you stayed all the next day? A. Yes.

Q. That is the 11th? A. Yes.

Q. And you stayed the night of the 11th? A. Yes.

Q. And you left early in the morning? A. Yes. At one of those days, I think, if I remember straight, I went and put a refrigerator door seal for a Mrs. Kostler or Kosketler.

Q. During that time that you made this visit to the

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farmhouse, and you stayed from the 10th to the morning of the 12th, did you go out to the barn at all? A. No.

Q. You detected nothing unusual? A. Nothing.

Q. Did you talk to the men about what they were doing, what they were working at? A. No, your Honor. I had no occasion to.

Q. Did you see them about the house all that time? A. Yes, they were just lounging around between the kitchen and living room.

Q. Doing nothing? A. Just doing nothing.

Q. Did you ask them whether they were working at anything about the place, did you? A. No, your Honor.

Q. You didn't ask them what their business was? A. No, your Honor. One time I asked him something and he said he was tired. He said he worked three days in a row. I didn't know what he was talking about.

Q. Who was he? A. This Jack fellow. He was out on a job.

Q. Are you able to speak Italian? A. Yes.

Q. Did you talk to this other man in Italian? A. No. He was mostly sleeping all the time.

Q. What? A. He was mostly sleeping all the time.

Q. During all that time you were there? A. You know, he was laying around.

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Q. You didn't inquire as to their business? A. No.

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Joseph Juliano—a Defendant—Cross

The Court: Go ahead.

By Mr. Frank:

Q. You saw these men up at the farm a number of times, didn't you? A. These men?

Q. Yes, Jack and the one who couldn't speak English? A. Yes.

Q. And you were down in the agent's office, the Treasury Department office, about two weeks after the truck was seized, is that right? A. I believe so.

Q. You were shown pictures at that time? A. Yes.

Q. Were you shown pictures of these men? A. I saw a lot of pictures. I don't know what they showed me.

Q. Were you shown pictures of those men that you say that you saw on a number of occasions up there at your farm? A. You showed me a lot of pictures.

Q. Were you shown— A. Those two were among them. The other—

Q. You didn't identify them though, did you? A. I don't know.

Q. Did you pick out the pictures of anyone that you saw on that day? A. I don't recall.

By the Court:

Q. Were you shown pictures or photographs? A. Yes.

Your Honor, when I walked into their office, they had a lot of pictures all over the desk. I was just in the middle here. They, you know, pointed out this one and that one.

Q. Did they show you pictures? A. They showed me a lot of pictures.

Q. Did they ask you to pick out from the group of pictures they showed you the men you had seen at the farm? A. I don't recall, your Honor.

Q. Did you at any time, after the raid, see the pictures of the men whom you had met at the farm? A. I was shown those pictures somewhere.

Q. Where? A. I don't recall, your Honor, whether at the farm or whether it was at their office or—

Q. Did you pick out any pictures and identify photographs as being photographs of men whom you had seen at the farm? A. No, your Honor.

Q. Were you asked to do so? A. I was asked to—

Mr. McAuley: Your Honor, may I interrupt to ask at this time, to ask for a clarification of the question of the Court? The Court's question and Mr. Frank's has a tendency, I think, to assume—

The Court: Mr. McAuley, there is no need for asking for any clarification. He hasn't indicated that he didn't understand any question.

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The Witness: I think I did, your Honor, but—

The Court: Read the question, Mr.—

Mr. McAuley: And the question before, the question put by Mr. Frank.

The Court: I am not concerned with Mr. Frank's question and that is about ten questions ago.

Mr. McAuley: I will wait for the next question.

The Court: I don't like to interrupt the questions I am asking now.

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Joseph Juliano—a Defendant—Cross

(Record read.)

Q. Finish your answer. A. Your Honor, I was shown pictures of characters that I knew.

Q. Were you asked to pick out from the group of photographs at any time the photographs of the men whom you had seen at the farm? A. No.

By Mr. Frank:

Q. You weren't asked to pick out any photographs of the men you saw at the farm, is that right, but you did see those men that you saw at the farm in the pictures that you saw? A. I didn't.

Q. Sir? A. I didn't.

Q. You said that you saw pictures of characters that you know, is that right? A. I know, yes.

Q. Who were those characters that you knew in those pictures?

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The Witness: Your Honor, this is not going to have anything to do with this, characters—

The Court: Speak up.

The Witness: Do I have to answer that?

The Court: There has been no objection made by your attorney. Answer the question.

The Witness: That doesn't have anything to do with this case.

The Court: You were asked who were the pictures of, the characters that you knew.

The Witness: I don't know their names. I know their faces.

Q. Where did you know them from? A. I was asked to testify for the Government about two years ago and

there were some men convicted of alcohol deals, and they wanted to know if I ever saw those men pass or have anything to do with the garage.

Q. What garage? A. A garage that I used to own in Brooklyn.

Q. When I asked you before whether there was anything about alcohol about that garage, that you used to own in Brooklyn, you said no, there wasn't? A. No, there wasn't, not from the time I took it.

Mr. McAuley: I object to that. No such testimony in the case.

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The Court: The jury will remember. Suppose we take our luncheon recess now. Would quarter to two be all right? All right, quarter to two, and we will adjourn today around four o'clock. Is that all right.

(Recess until 1:45 p. m.)

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AFTERNOON SESSION

(Jury present.)

JOSEPH JULIANO resumed the stand.

Cross Examination by Mr. Frank:

Q. Mr. Juliano, you said before that when you went down to the agents' office in Newburgh you saw the pictures of men whom you had known at the still, is that right?

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Mr. Chapman: I object to that, your Honor.

A. No.

Mr. Chapman: That is not a fair interpretation of what was said. He said he saw pictures of characters of a still entirely different and apart from what is involved here.

The Court: I think Mr. Chapman's point is well taken. Next question.

Q. What did you say before when I asked you whether you saw the pictures of the men who had been at the premises, your farm premises?

Mr. Chapman: I object to that.

A. You didn't ask me any question about the farm.

Mr. Chapman: Excuse me, Mr. Witness. That question wasn't asked, your Honor.

The Court: Objection sustained.

You say you were shown a number of pictures.

The Witness: Yes, sir.

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The Court: And you were asked to pick from amongst those pictures the photographs of the men whom you saw at the still.

The Witness: No, sir. Men that I knew.

The Court: Were you asked to take from those photographs the photographs of the men whom you saw at the still—

The Witness: No, sir.

The Court: —or at the house.
The Witness: No, sir.

Q. Were you shown pictures? A. Yes.

Q. What were you asked concerning those pictures? A. I was asked to pick out pictures of faces that I knew, period.

Q. And you weren't asked whether any of those men were at your—you had seen at your home? A. Yes, I was asked after, and I answered "None."

Q. No, there were no pictures there? A. No.

Q. I show you Government's Exhibit 41 in evidence and ask you whether you were shown that picture when you went to the agents' office. A. I don't recall. You see, I saw this face after. I can't say for sure I saw it at your office.

The Court: Showing the defendant—
The Witness: This picture (indicating).

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The Court: Government's Exhibit 41.
The Witness: I was shown that picture but I don't think it was at the office or at that particular time.

Q. Did I ever show any pictures in my office? A. No, not in your office, no, sir We are talking about—you are asking me questions in reference to the Newburgh office.

Q. That is right. Did you just say that you saw pictures in my office? A. No, no, no. Positively not, I saw no pictures whatsoever in your office.

Q. You weren't shown that picture at the Newburgh office, is that correct? A. I can't say for sure. I saw this

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picture many times, and I just don't know where or on what occasion.

Q. Did you identify that picture as anybody? A. I can.

Q. Did you then identify that picture as anyone? A. I don't remember seeing it then.

Q. Didn't you say that that picture was shown to you at one time or another and that you had seen it many times? A. After my arrest or after—

Q. I show you that picture. A. This was shown to me by all the Federal agents at the Newburgh office.

Q. Did you ever identify that picture? A. I don't know

if I did or not. I was shown many pictures.

Q. You were shown that at the Newburgh office, is that correct? A. I am assuming that I was shown it.

The Court: No. Were you?

The Witness: I don't recall. I do not recall.

Q. You saw that picture many times? A. Yes, I did.

Q. Federal agents showed you that picture many times? A. Yes.

Q. Did you ever identify that picture? A. I don't know whether I did or not.

The Court: Whose picture is it?

The Witness: This is a picture of Joseph Bosco.

The Court: Do you know Joseph Bosco?

The Witness: Yes, I do.

The Court: Did you ever see him up in your farm?

The Witness: I did not.

The Court: Go ahead.

Joseph Juliano—a Defendant—Cross

Q. How long have you known Joseph Bosco? A. If I recall correctly, I was shown that picture at the—

The Court: No. You were asked, how long do you know Joseph Bosco.

The Witness: Well, your Honor, he was pointed

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out to me and they told me he was the driver.

The Court: How long do you know him?

The Witness: Personally?

The Court: Yes.

The Witness: I didn't.

Q. When was the first time you saw him? A. I believe that is one of the pictures they showed me at that office.

Q. I asked you, when was the first time you saw him? A. First time I saw him? I don't know.

Q. Well, was it at the farm? A. No. At the farm, no.

Q. Prior to the time you bought the farm? A. No, I didn't.

Q. After you lost the farm? A. After I lost the farm, yes.

Q. Before you got into court? A. Before the 6th? What do you mean before court? I mean, specify. What?

Q. Before you ever came down to court. A. When?

Q. At any time. A. Yes, I have seen him in court.

Q. I asked you, did you ever know him before you came down to this court? A. No.

Q. I show you Government's Exhibit 39 for identification and ask you whether this picture was shown to you

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at the Newburgh office. A. I was shown this picture, but I don't know if it was there.

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Joseph Juliano—a Defendant—Cross

Q. Were you shown that picture at the Newburgh office?

Mr. McAuley: He answered.

A. I don't know.

Q. Were you ever shown that picture? A. Yes.

Q. When? A. Well, you see, I know this man's face so it is hard for me to say whether I saw the picture or him in person. This is the man who was at the farm.

Q. At the time you were shown the picture, who were you shown the picture by? A. There was a gang of fellows down there in that office, in the Newburgh office.

Q. Then you were shown that picture at the Newburgh office? A. I am not sure. You see, I know this man's face so I could see his picture and maybe I think I seen his picture before.

Q. How many times did the agents show you pictures? A. They showed me pictures many times down there.

Q. Down where? A. Down before—this Newburgh office.

Q. How many times did you go down to the Newburgh office? A. I spent about six hours in there.

Q. I asked you how many times you went down, how many separate occasions. A. I went—I believe I went

down there twice. Once is sure. I think twice.

Q. So you went down there on different—on two occasions? A. I believe so.

Q. On both occasions you were shown pictures? A. Let's talk about one occasion. I am not sure about the second.

The Court: Answer the question.

Q. On both occasions you were shown pictures? A. I don't recall whether it was twice, your Honor. I am sure it was once.

Q. So you went down there once? A. Yes.

Q. And on that occasion you were shown pictures? A. Yes.

Q. And on that occasion were you shown this picture? A. I don't recall whether I saw this picture.

The Court: What picture?
The Witness: This is Jack.
Mr. Frank: Government's Exhibit 32.
The Court: Who?
The Witness: Jack.
The Court: Jack who?
The Witness: Jack. That is the old man's son.

Q. So that you had seen that picture before then? A. Before what?

Q. Before this time. A. I am not sure.

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Q. Didn't you just say before that you had seen that picture on many occasions but you didn't know whether you saw it at the Newburgh office? A. I did; I saw the face. I don't know whether I saw it on the picture. I know the face.

Q. Didn't you tell me before, just a few questions ago, that you had seen Government's Exhibit 39 for identification? A. I am not sure whether I saw that face on a picture, but I know the face.

Q. Do you now wish to change your testimony and say you aren't sure that you ever saw this picture before?

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Joseph Juliano—a Defendant—Cross

Mr. McAuley: Objection. Hasn't ever testified as Mr. Frank says.

The Court: The jury will recollect. Objection overruled.

Do you wish to state you never saw that picture at the Newburgh office?

The Witness: I am not sure, your Honor. I can't say yes or no.

Q. Did you ever see this picture before?

Mr. McAuley: Before when, before today?

Q. (Continuing) Before today. A. I am not sure.

The Court: In any event, whether you saw that picture down in Newburgh or not, you didn't pick

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it out as being one of the men you had seen at the farm?

The Witness: I don't think so, your Honor.

The Court: Did you pick out anybody's picture as being the picture of the man you had seen at the farm?

The Witness: Your Honor, I didn't pick any pictures out of people down at the farm.

Q. You said when you were at the Newburgh office you did see a number of pictures of characters whom you knew, is that right? A. Yes.

Q. Did you pick out any pictures then? A. Yes, I did.

Q. What pictures did you pick out? A. Pictures that

were shoved in front of me, and says, "Do you know this guy?"

"Yes, I do."

Q. How did you know that man? A. I know him.

Q. From where? A. I know the man's face.

Q. From where? A. I spoke to him. I talk to him.

Q. From where? A. From Brooklyn, the vicinity of the garage.

Q. Was he an associate of yours? A. An associate of mine? No.

Q. An acquaintance? A. Acquaintance, probably.

Q. Well, "probably." Don't you know where you knew

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him from? A. I ran a business on 81st and 18th Avenue and anybody was allowed to walk in. It was a public place.

Q. Was he a customer of yours? A. Yes.

Q. He was a customer? A. Yes.

Q. So then, when I asked you whether he was an acquaintance, you mean he was a customer? A. That is right.

Q. You recognized him? A. Yes.

Q. How long ago did you run this garage? A. I ran it from 1940—end of 1944 up until September of 1947.

Q. So that was in 1947? A. Yes.

Q. Did this customer have a truck? A. This customer had an automobile.

Q. Had an automobile? A. Yes.

Q. Did you see anybody else that you knew? A. Well—

Q. Among the pictures. A. A lot of customers.

Q. There were a lot of customers— A. Yes.

Q. —among the pictures? A. Yes, a lot of faces.

Q. All were customers? A. We are referring to pictures in that office?

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Joseph Juliano—a Defendant—Cross

Q. That is right, the pictures. A. I say, I picked out two, three, the most.

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Q. And you picked two or three men? A. Yes.

Q. But you knew more? A. No, I didn't know any more than they showed me.

Q. All three were customers of yours? A. Yes.

Q. They stored their cars or trucks in your garage? A. They stored their cars, bought gasoline and so on.

Q. Did they all have cars? A. Yes.

Q. None of them had trucks? A. I don't think so.

Q. Are those the people that you were questioned about? A. No.

Q. You can't state, then, that you weren't shown Government's Exhibit 39 for identification? A. I can't say for sure whether I saw it on a picture or if I just remembered him through his face.

Q. You can recall, however, that you remembered men from 1947 who were customers? A. Yes.

Mr. McAuley: Your Honor, the defense has no objection to Mr. Burchill conducting the examination if he wishes.

The Court: Now, Mr. McAuley, there is no reason for you to make any such statement. Sit down. Perfectly proper for Mr. Burchill, assistant United States attorney, to sit there and to aid a younger, junior assistant. Nothing wrong in that.

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Mr. McAuley: I didn't say there was anything wrong.

The Court: Go ahead.

Mr. McAuley: I said we are perfectly willing to have the older assistant—

The Court: You know your comment was improper. Don't do it again.

Next question.

Q. You had been to your premises a number of times after December, is that correct? A. Yes.

Q. And on all these occasions somebody was at your premises? A. Yes, at least three times.

Q. On one occasion you actually stayed over a couple of days? A. Yes, one day and a couple of nights, yes.

Q. And at no time did you ever see any sugar bags? A. A. I did not.

Q. Did you ever see any trucks? A. I did not.

Q. Did you ever see any activity at all? A. I did not.

Q. That did not excite your suspicion? A. No.

Q. Let me ask you—

Mr. McAuley: Fix the time, please,—

Mr. Frank: He has answered the—

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Mr. McAuley: —you are talking about.

The Court: He has already indicated it. Now, don't be carrying on conversations. If that is an objection, it is overruled.

Q. On no occasion when you were there did you ever see any activity? A. I did not.

Mr. McAuley: Will he tell what he means by "activity"?

The Court: What is your objection?

Mr. McAuley: I request that he be instructed to clarify the word "activity." Might mean anything.

The Court: The witness apparently understood what the—

Mr. Chapman: He didn't answer it yet, your Honor.

The Court: I think he did.

Mr. Chapman: If he did, I withdraw the objection.

Q. Did you ever see the men working there? A. I did not.

Q. No one ever worked there, is that right? A. That is right.

Q. They just lounged around this house, is that what you said before? A. When I got there was weekends and I took it for granted they didn't do—

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Q. Did you see them outside the house doing any work? A. No.

The Court: The day you bought that telephone, what day of the week was that?

The Witness: I don't recall.

The Court: What date was it on the calendar—on the slip?

Mr. Frank: January 10, 1950.

The Court: What does your calendar show on that, Mr. Chapman? You have a calendar in your pocket.

Mr. Chapman: That would be a Tuesday, your Honor.

The Court: That wasn't a weekend, was it?

The Witness: Then February 11—wait a minute. What are you talking about, January?

The Court: I say, the day that you went to buy this telephone, that was shown to be Tuesday, February 10.

The Witness: Yes.

The Court: That was not a weekend, was it?

The Witness: That is—

Mr. Frank: That was January 10th.

The Court: January?

The Witness: January 10th.

The Court: That wasn't a weekend, was it?

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The Witness: No.

The Court: Go ahead. Next question.

Q. Were they in the house on that occasion too? A. Well, I don't know what date that refers to.

Q. On January 10. A. Well, I could have bought that on January 10—

Q. When you bought the telephone— A. I bought the telephone on January 10th. That don't say I went to the farm on January 10th.

Q. Did you go to the farm the day you bought the telephone? A. I don't know. I don't remember.

Q. Can you say you didn't go to the farm the day you bought the telephone? A. No, I can't.

Q. But you gave them the telephone, is that right? A. Yes.

Q. Did you give it to them the same day you bought it? A. I don't recall.

Q. The next day? A. I don't recall.

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Q. Did you take the telephone back to New Berlin? A. Maybe I did.

The Court: Did you?
The Witness: I don't recall.

Q. You don't recall whether you didn't take the telephone back to New Berlin? A. I do not.

Mr. McAuley: I object. Obviously, if he doesn't recall, he doesn't recall.

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The Court: Objection overruled.

Q. You never saw the men working either inside or outside the house? A. That is right.

Q. Did you ever see them outside the house at any time? A. No.

Q. Whenever you saw them, you were inside the house? A. That is right.

Q. The last time you got there, on February 10, I believe you have stated—February 9th—there was snow on the ground, is that right? A. Yes.

Q. And how long did you stay at your house on that occasion? A. Was shown I stayed there Friday, Saturday and Sunday.

Q. Three days, is that right? A. Yes.

Q. During that time no truck ever came to the house, is that right? A. Nothing.

Q. When you got there was there fresh snow on the ground? A. I don't know.

Q. Do you recall when was the last time it snowed? A. It snowed the beginning of December.

Q. In other words, snow had been there since the beginning of December? A. Generally stays there all winter.

Q. Did you see any tracks on the ground? A. I didn't notice.

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Q. Did you have any trouble driving into the premises? A. At times I had, so I left the truck out on the bridge.

Q. Did you, on that date, when you came there on February 9 have any trouble driving into the premises? A. I don't recall.

Q. Do you recall whether you brought your car up to the garage? A. In winter it is a practice there to leave your vehicle out at the road and walk up.

Q. Do you recall whether you brought your car up? A. I do not.

Q. Do you say that you left it on the road then? A. I don't.

Q. Well now, you testified before, I believe, that Mr. Giollanno said that he wanted the place to store trucks. A. Yes, truck.

Q. A truck? You didn't enter the garage to see whether a truck was there? A. I didn't.

Q. You didn't rent him the garage, did you? A. I did not.

Q. You rented him the barn? A. That is right.

Q. Did he store a truck in the barn? A. I don't know.

Q. You never looked in the barn? A. I didn't bother looking.

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Q. If—there was snow on the ground, was there? A. Yes.

Q. And it was pretty hard to get your car up that day? A. I don't know if I brought my car up that day.

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Joseph Juliano—a Defendant—Cross

Q. You testified before that you generally left your car down on the road because— A. Yes.

Q. —it was hard to get up during the winter, is that right? A. Yes.

Q. And did you leave your car down on the road for three days? A. I don't recall.

Q. Didn't it seem at all strange to you that they would be using your premises to store a truck in the wintertime when it was hard to get a car or truck up to the garage or to the premises? A. Didn't occur to me.

Q. Didn't it occur to you that it was rather strange to see men, three men on the premises— A. Two men.

Q. —for the storage—two men on the premises? A. That is right.

Q. —for the storage of one truck? A. No.

Q. It didn't occur to you? A. No.

Q. You were never curious to find out what it was all about? A. No.

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Q. You stated before that there were a number of towns around West Berlin. A. New Berlin.

Q. New Berlin, I am sorry. Is that correct? A. Yes.

Q. Fairly large towns? A. Well, Norwich is 14 miles away and it is a good size little town.

Q. When you say good size little town, what would you estimate the population? A. Roughly, I would say maybe 8000.

Q. Are there any bigger cities around? A. Yes, Oneonta, Utica.

Q. Utica is how far away? A. 36 miles.

Q. How big is Utica? A. Big.

Joseph Juliano—a Defendant—Cross

Q. Is Utica bigger than Kingston? A. I should say it is.

Q. That is 36 miles away? A. Yes.

Q. You bought a septic tank, didn't you? A. Yes.

Q. You went all the way down to Kingston to buy a septic tank for use in New Berlin, is that right? A. Yes.

Q. You could have gone to Utica? A. I could have gone anywhere. I could have bought it right in New Berlin.

Q. Yet you went all the way down to Kingston to buy that tank there? A. Yes.

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Q. You testified before that was a 30-gallon tank, is that correct? A. 30? I didn't testify no such thing.

Q. Did you testify—how many gallons was that tank? A. 300.

Q. A 300-gallon tank. Was there a particular reason that you went to Kingston to buy that tank? A. Yes.

Q. Instead of West Berlin? A. Yes.

Q. How far is your place in West Shokan away from Kingston? A. 19 miles.

Q. Is that a populated area where you live? A. No.

Q. Leaving your house and going to Kingston, where does it become populated or get populated? A. It don't, not until you get into Kingston.

Q. Didn't it seem strange to you that a man from Kingston, with a New York address, wanted to rent your property to store one truck when the distance from your property to Kingston was not populated? A. No.

Q. That didn't seem strange? A. No.

Q. Did it seem strange to you that he wanted to pay you $65 a month for the storage of one truck? A. No.

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The Court: Seem strange to you that he came in December, in the winter, to rent your premises?

The Witness: I don't think so.

Q. You said he paid you rent immediately. A. Yes.

Q. Did you ever take bookkeeping? A. No.

Q. Do you operate your household on a budget? A. I don't follow you.

Q. Do you keep a budget? Do you operate your household on a budget? A. No.

Q. Do you write down what you spend? A. No.

Q. You just spend it and that's that? A. That's right, when the pocket is empty, there is no more.

Q. I show you Government's Exhibit 36 in evidence which looks like your handwriting, and ask you whether those entries that are contained therein— A. I don't remember writing these things down.

Q. Could you have written them down? A. I don't think so.

Q. It looks like your handwriting, though? A. It does. You see, I am not in the habit of putting down things.

Q. You stated that when you got down to the Newburgh

office and the agents questioned you that they all or one agent kept on talking. A. All talk.

Q. They all talked? A. And they just told me to answer yes or no.

Q. Is that right? A. No. You see, there were a lot of questions thrown around.

Q. Didn't you state before on direct testimony that all they let you do was answer questions yes or no? A. No. They made statements themselves. They made statements themselves and asked me whether it was right or wrong.

Q. And that is all they did? A. That is all. That went on all day.

Q. All you had to say or answer was it was right or wrong. A. Yes. Then they put pictures in front of me, showed me pictures.

Q. But, in other words, they didn't ask you to tell them— A. Oh yes, yes.

Q. Then they didn't stand around all day and make statements and ask you whether it was right or wrong, did they? A. They asked me all kinds of questions and I answered what I possibly could.

Q. I asked you just a second ago— A. Yes.

Q. —they didn't stand around all day and ask you—make statements and ask you whether it was right or

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wrong? A. Part of the day, yes.

Q. You said before that is all they did. Do you wish to change that? A. All right, that's all they did, period.

Q. That's all they did? A. Yes.

Q. And they did nothing else? A. They wanted me to sign a statement they wrote.

Q. You weren't allowed to say anything on your own? A. I was allowed to say anything I pleased.

Q. But all you were told to say was, right or wrong? A. You try to listen to 20 people at one time.

Q. All you were told to say was, right or wrong, is that right? A. Yes.

Q. And they didn't tell you to say anything else nor did they let you say anything? A. Yes, I could say anything I want. They didn't stop you.

Q. But all you said was right or wrong? A. All I said was what I could possibly answer, that's all.

Q. You didn't, perchance, give them a narrative history of yourself, did you? A. Very, very bare.

Q. Very, very bare, yes.

Mr. Frank: Mark this for identification.

(Marked Government's Exhibit 63 for identification.)

Q. I show you Government's Exhibit 63 for identification and ask you whether you have ever seen that exhibit before?

Mr. McAuley: Isn't that paper marked for identification rather than an exhibit?

Mr. Frank: I said "Government's Exhibit 63 for identification."

Mr. McAuley: You said "Exhibit" before, I don't think it is an exhibit yet.

A. Want me to read this all through?

The Court: Look at the paper hurriedly and tell counsel whether you ever saw it before. Did you ever see it before?

Do you have to read it?

The Witness: I want to see what is in it.

The Court: Without seeing what is in it, looking at it hurriedly, can you tell us whether or not you ever saw that paper before?

The Witness: Your Honor, it is a common paper.

The Court: Did you ever see it before?

The Witness: No.

The Court: All right. Now, look at it more carefully and then tell us whether you have ever seen it before, and if you have to read it, do so, in order

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to refresh your recollection.

The Witness: This seems like a state—this seems like part of the discussion we had at the farm.

The Court: You were asked, did you ever see the paper before.

The Witness: Yes, I did,—I didn't see the paper before. I heard the discussion before.

Q. Now I ask you, Mr. Juliano, weren't you given Government's Exhibit 63 for identification— A. Yes.

Q. —to sign down in the Newburgh office? A. Yes.

Q. So then you saw it at the Newburgh office? A. Yes, I saw that at the Newburgh office.

Q. You were given this to sign as a statement you made? A. I assume that is what it was, or that is what it is now.

Q. Let me read some of this to you.

Mr. McAuley: I object.

The Court: Wait a minute.

Mr. McAuley: I object, your Honor.

The Court: Objection sustained.

By the Court:

Q. When you were shown this paper, who showed it to you? A. I don't recall, your Honor.

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Q. Was it one of the agents? A. Oh, yes, yes, it was one of the agents—more than one.

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Joseph Juliano—a Defendant—Cross

Q. Did you read this paper at the Newburgh office? A. Yes, I did.

Q. Did you read it through? A. I believe it was read to me.

Q. Did you read it yourself? A. No.

Q. Did you have it physically in your hands at the Newburgh office? A. I don't recall, your Honor.

Q. Would you say you had read it? A. I will say that I didn't.

Q. Did you read it yourself at the Newburgh office? A. I don't think so. I cannot answer for sure because I don't recall. I believe it was read to me.

Q. By whom? A. By one of the agents.

Q. Did you listen to it as it was read? A. Yes, I did, if that is the same paper.

Q. Well, I don't know. A. I don't either.

Q. You looked at it, you have examined it carefully. Is that the same paper that you were shown in the Newburgh office or you saw in the Newburgh office? A. I mean, it's a common paper with a lot of writing on it.

Q. It isn't a common paper. It is a particular paper with writing on it, apparently four or five sheets. A. I

didn't study it.

Q. Are you able to state whether that paper, which you now hold in your hand, Exhibit for identification 63, was the same paper that you saw in the Newburgh office? A. No, I can't assert that.

By Mr. Frank:

Q. Then you wish to change your previous testimony in which you stated, yes, that is the paper you saw in the Newburgh office?

Mr. McAuley: He didn't say so categorically.

The Court: Ar[illegible] if he did, the jury will recall. Objection overruled.

A. No.

Q. You don't want—you don't wish to change that previous testimony? Which is it, did you see it in Newburgh or didn't you? A. I don't know if that is the paper you showed me.

Q. You said before to me, not five minutes ago, that this is the paper that you saw in the Newburgh office and was given to you as a statement to sign.

Mr. McAuley: I object as argumentative.

Q. (Continuing) Did you say that?

Mr. McAuley: Objection. Argument.

The Court: Objection overruled.

Did you tell that to Mr. Frank a few minutes

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ago, that this paper—

The Witness: I didn't get the question right, your Honor.

The Court: Listen to the question: Did you tell Mr. Frank a few minutes ago that this paper, Exhibit 63 for identification, was given to you in the Newburgh office and you were requested to sign it.

The Witness: Your Honor, I believe I said yes to the contents of that, that was read to me, not the paper itself.

The Court: Go ahead. Next question.

Q. Do you now say that you didn't see this paper? A. That's right, I say I didn't see that paper.

Q. But the contents of it were read to you, is that right? A. I don't know if that is the contents.

Q. Will you read Government's Exhibit— A. I read part of it.

Q. That is short. A. There's a lot of pages there.

Q. Read the whole thing.

Mr. McAuley: May the witness be requested—

A. OK.

Mr. McAuley: —to read the entire thing? And I enter a further objection that this is not the proper witness by whom to enter this exhibit.

The Court: If that is an objection, it is over-

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ruled. It is proper cross-examination.

(A pause.)

The Court: Have you read the paper now?

The Witness: Yes, I have, your Honor.

The Court: Is your recollection refreshed as to whether or not it is—

The Witness: I have never seen that paper. That is part of a statement, your Honor. That is part of a statement.

The Court: Are the facts in that statement—

The Witness: A few facts are there.

The Court: Excuse me. Are the statements in that paper correct statements of what you told the agents?

The Witness: Some are and some are not.

Q. Well, are the contents of this statement the same thing which was read to you or told to you or shown to you on the day that you were in the Newburgh office? A. I don't recall.

Q. You heard Mr. Lane's testimony before, didn't you? A. You mean the other day?

Q. Major Lane's testimony the other day. A. Yes.

Q. And you heard him testify to what— A. Yes.

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Q. (Continuing) —you had told him.

The Court: That is not proper, Mr. Frank.

A. Yes, I did. About one-tenth of it—

The Court: All right, now, please.

Q. Mr. Juliano, I show you Government's Exhibit 31 in evidence. You recognize that, don't you? A. Yes, I do.

Q. What did you say before you used the contents, or the nipples and the belt and the gate for? A. With the exception of the belt, I used all of that material at Louis Tenaro's boarding house for the installation of a water pump and a water line.

Q. Did you say that you were in the refrigeration business? A. Yes.

Q. Water pump is not refrigeration, is it? A. What does that matter? I did it.

Q. Water pump is not refrigeration, is it? A. Water pump is not refrigeration, is not.

Q. Did you ever tell an agent of the Federal Govern-

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ment that you had used these things in your refrigeration business? A. They never asked me.

Q. And did you ever tell Agent Lemmler and Agent Ginanatasio that you used this particular material on this invoice for your refrigeration business? A. I just saw that invoice here in court for the first time. I never knew

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you had it.

The Court: He asked you the question, did you ever tell the agents that, yes or no?

The Witness: No.

Q. Did the agents ever question you about one and a half by three galvanized nipples? A. No, they asked me questions pertaining to pipes and fittings.

The Court: Did you want to make an objection, Mr. McAuley?

Mr. McAuley: No, your Honor.

Q. What did you tell them you used those pipes and fittings for? A. They asked me if I used pipes and fittings. I said I certainly did.

Q. Did they ever ask you about 1½-inch pipe and one— A. They asked me questions about large pipes. I said yes, I used that.

Q. Used them in your refrigeration business? A. Yes, refrigeration business, plumbing or anything.

Q. You do a lot of plumbing, don't you? A. Yes.

Q. When you went into the Airdon Company to buy that septic tank, what type tank did you ask for? A. I asked for a septic tank.

Joseph Juliano—a Defendant—Cross

Q. You asked for a particular size, didn't you? A. 300

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gallons—I wanted a five but they didn't have any fives, so I took a three.

Q. You asked them for a 500-gallon tank? A. Yes.

Q. Didn't the man who sold you that tank tell you a tank that large was enough to supply a boarding house and a 300-gallon tank would be enough? A. No; didn't have 500 gallons. He gave me the three, and I accepted it.

Q. How many people would you say a 300-gallon tank could take care of? A. I don't know. I am not a scientist.

Q. Didn't you just say before on direct— A. Five or six people, OK. That is a good guess.

Q. So a 500-gallon tank can take care of considerably more? A. I guess so.

Q. Did you ever take any vitamins on to your farm? A. What?

Q. Did you ever take any vitamins on to your farm? A. Did I ever take any vitamins?

Q. Yes. A. I don't get that clear.

Q. I have asked you whether you ever took any vitamins to your farm. A. Did I ever take any vitamins to my farm?

Q. I asked you the question— A. Well—

Q. —did you ever buy any vitamins and carry them to

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your farm house? A. I didn't buy any vitamins and carry them to my farmhouse.

Q. Did you ever carry any vitamins to your farmhouse? A. Yes, I did.

Q. When was that, Mr. Juliano? A. I don't recall the exact time but I believe it was in the summer of 1949. I had several hundred bags on the truck.

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Q. Did you dump one of those bags? A. I didn't dump it. It accidently spilled.

Q. One of those bags accidently spilled? A. Yes.

Q. Did a Mr. Bender—

The Court: What was it, fertilizer?

The Witness: No, it is some kind of feed that my brother-in-law's farmer had up there that he was giving to supplement—

The Court: To cows?

The Witness: To the cows. Looks like a red cement.

Q. Did a Mr. Bender come to you and tell you that some of his cows had been sick? A. No.

Q. Does it refresh your recollection if I tell you that you said to him that you had accidently spilled a bag of vitamins and that was why his cows were probably sick? A. Yes, but your first question was wrong.

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Q. What did he tell you? A. He came to find out why the stream was red in blotches, and I explained to him what I did, and I took him down and I showed him.

Q. And did he say that his cows were sick as a result of it? A. No. He isn't the only one with cows down there.

Q. How big was a bag—was anybody's cows sick? A. Nobody's cow was sick.

Q. Did anybody tell you the cows were sick? A. No, nobody mentioned anything about sick cows.

Q. How big were these bags of vitamin? A. A hundred pound bag. In a burlap bag like a potato sack.

Q. When you dumped it— A. I spilled it.

Q. When it spilled, it went into the stream, is that right? A. Yes.

Q. Is that a quickly running stream? A. Yes, it is.

Q. That is one 100-pound bag? A. That is right.

Q. A quickly running stream? A. That is right.

Q. How soon after you dumped these vitamins did you see— A. Well, I made a turn on the bridge. It is a wood bridge. It is a very hard turn to make, and I had these bags on the Dodge truck without the racks, so at least two bags fell off the side.

Q. At least two bags? A. At least.

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Q. Is that because you were going fast? A. For reasons, unknown reasons, I spilled them, period.

Q. At any rate, two bags fell right into the stream, is that right? A. That is right.

Q. When did Mr. Bender come to see you about the stream? A. I believe it was the next morning.

Q. And you took him down to the stream and you showed him that the stream was still red and blotchy from those two bags of vitamins? A. A spot here and a spot there along the side on the rocks.

Q. Couldn't have been mash that polluted that stream? A. I wouldn't know what mash looks like.

The Court: You saw mash later on in the barn, did you not?

The Witness: I did not.

Q. You never looked in the barn, did you? A. I did not.

Q. You never were inside the barn even after the agents raided it? A. I was not.

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Joseph Juliano—a Defendant—Cross

By the Court:

Q. When you were asked to get these telephones, who was the man that asked you to buy them? A. The man whose picture we just had here, Jack.

Q. Jack? A. Yes, sir.

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Q. What did he say to you, why he wanted it? A. He just asked me if I would bring him back a set of telephones. I said "I certainly will."

Q. What did you say? A. Nothing else.

Q. Did you ask him what he wanted them for? A. No, I didn't.

Q. Did he tell you what he wanted them for? A. No.

Q. Did he tell you how much he wanted to pay? Did he give you any money at the time? A. No, sir.

Q. And you went down and bought them? A. That is right. Well, he knew the price and everything else. There was a Montgomery Ward catalogue laying around. They had it on the pages—

Q. You didn't buy it from Montgomery Ward? A. No, I bought it in Herzog's.

Q. Was there a Sears, Roebuck in Kingston? A. No.

Q. You went into a local hardware store? A. Yes, sir.

Q. When you brought them back, what did you do with them? A. I just gave them to him in a box—package. I gave them to him and he paid me for them.

Q. Did you at that time buy bell wire? A. Yes, bell

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wire.

Q. How many feet? A. And batteries and a pair of telephones.

Q. How many feet of bell wire did you buy? A. I don't recall. On the picture in the book it states just what you need.

Q. Does it tell you in the book how many yards or feet of bell wire you need? A. It must because the guy told me to get him the wire and the batteries.

Q. Did this man John or Jack tell you how many feet of bell wire to get? A. I believe he did.

Q. How many feet did he tell you? A. I don't recall. It is on the slip.

Q. Look at the slip and see if that refreshes your recollection as to how many feet he told you to get of bell wire. A. I don't know how many feet there is to the pound now, but there is three bundles, three one-pound rolls of No. 18 wire.

Q. Does that refresh your recollection as to the length of bell wire that you bought? A. No, I don't recall.

Q. Do you remember how you came to buy three rolls of bell wire instead of one? A. I believe that is what he asked me to get him, three rolls of wire.

Q. And did he ask you to get three rolls or to get so

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many feet of bell wire? A. I think he said rolls because it comes in rolls.

Q. Are you sure that is what he said? A. Fairly sure.

Q. Were you familiar with rolls of bell wire? A. Why, certainly.

Q. Are you familiar with the number of feet of bell wire in a roll now? A. No.

Q. Did you ask him why he needed all this wire and where he was going to run the phones from? A. No, I didn't.

Q. He didn't tell you, did he? A. No.

Q. After, did you see the telephones installed or any of the telephones? A. No.

Q. Either one of the instruments? A. No, I didn't see the telephone, sir.

Q. Did you see any wire running from the house at any time? A. There's a number of wires from the house.

Q. Did you see any wires— A. No, I didn't notice any additional wires.

The Court: Go ahead.

By Mr. Frank:

Q. How long do you say you were living at the farm before you left? A. At the farm?

Q. Yes. A. Shokan—West Shokan?

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Q. That is right. A. About three—about two and a half or three years, at least.

Q. Was there any wire—were there any wires while you were living there leading from the barn to the house? A. Yes.

Q. What wires were they? A. Electric light wires.

Q. Any other wires? A. That's all.

Q. You are pretty well acquainted with that farm, aren't you? A. Certainly.

Q. You lived there for three years? A. About two and a half, three years, yes.

Q. If there had been another wire, an additional wire, from the barn to the house— A. Yes.

Q. —you would have noticed it, isn't that right? A. I don't know.

Q. That wire that you bought, that three rolls of wire, wasn't that enough wire to reach from the house to the barn? A. I don't know how many feet there is in that length.

Q. Wasn't it enough? Couldn't you see from the size of the rolls it was enough? A. Packages—they are packages.

Q. You mean you never saw them unwrapped? A. No.

Q. They were always wrapped when you saw them? A.

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Yes.

Q. You bought something without ever looking at it? A. I was told to buy it and I bought it.

The Court: Now, it came in little cardboard boxes, didn't it?

The Witness: Yes, sir.

The Court: What was on the outside of the cardboard boxes? Didn't it say how many feet?

The Witness: No, just said pound.

The Court: Didn't it say how many feet of bell wire?

The Witness: No, I believe it said just pound.

The Court: Are you sure?

The Witness: I think they are one pounders.

The Court: Are you sure it didn't say how many feet?

The Witness: I didn't say, your Honor.

The Court: Are you sure it—

The Witness: If I was sure, I would know how long it was.

Joseph Juliano—a Defendant—Cross

Q. Going back to February 16, 1950, you said that you drove up about a mile from the farm, is that right? A. Yes.

Q. And that a mile from the farm you met some neighbors of yours. A. Yes.

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Q. Whom you can't remember? A. I remember his name, Emil—I can't think of the name. I know it is Emil anyway.

Q. Whom you can't remember— A. I can remember his name. It just don't come to me right now.

Q. —and they told you— A. He told me.

Q. —that the biggest still you have ever seen in your life had just been raided, is that right? A. That is right, on my farm.

Q. And you got panicky? A. Yes.

Q. And you turned around and you ran— A. Yes.

Q. You ran all the way back? A. No, I drove.

Q. You drove all the way back to New Berlin? A. Yes.

Q. You hadn't done anything wrong, had you, Mr. Juliano? A. No.

Q. Then you had nothing to get panicky about, did you? A. No.

Q. But you got panicky, didn't you? A. Certainly.

Q. You were afraid? A. I wasn't afraid. I was just, you know, surprised.

Q. And because you were surprised, you got panicky? A. That is right.

Q. Whenever you get surprised you get panicky? A. Well, under the circumstances.

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Q. Under what circumstances, Mr. Juliano? A. Under the circumstances, I took off.

Q. You felt it was better to run away, is that right? A. Well, I figured it was better than running in there. I can prove something from the outside. I can't from the inside.

Q. You thought then you would get in trouble yourself, is that right? A. Certainly.

Q. Is that because you had a guilty conscience? A. No.

Q. It took you an awful long time to answer that question, didn't it, Mr. Juliano? A. (No answer.)

Mr. Frank: Withdrawn.

Q. During this time, from the time you say that rented the barn on the farm to February 15, were you employed? A. I was not.

Q. You weren't employed? A. Wait a minute. I was.

Q. You were employed? A. Yes, I was.

Q. You were either employed or you weren't. A. I was employed.

Q. Where were you employed? A. I was self-employed. I just opened up a service station up there in New Berlin.

Q. Is that from the time, December, when you say you rented— A. Oh, no, no. I am sorry. That was after.

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That was after. I was employed up to December 2nd. No, I was unemployed at the time.

Q. Mr. Juliano, just getting back to this septic tank for a moment, you are an experienced handyman, isn't that so? A. I guess so.

Q. You do your own plumbing, is that right? A. Yes.

Q. Do your own refrigeration? A. Yes.

Q. You can fix an automobile? A. To a certain extent.

Q. You knew in the middle of January that you couldn't

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get a septic tank into the ground, didn't you? A. Yes, I knew that.

Q. Nevertheless, you went all the way down to Kingston to buy a septic tank, is that right? A. Yes.

Q. Did you say before that Mr. Bartsch told you how much wire you would need for the telephone? A. Mr. Bartsch told me how much wire I would need?

Q. Bartst or Bartsch, you heard him testify the other day, I believe, the man from Herzog's? A. Yes, I heard him testify, yes.

Q. Did you say before that you talked with him about the telephone set? A. I did not.

Q. Mr. Bartsch is a curious sort of person, isn't he? A.

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That is your—

The Court: That is a matter of opinion. I didn't observe anything curious about him. Next question.

Q. You have known Mr. Bartsch for a long time? A. At least for two years prior to the telephone sale.

Q. Your friend? A. We are not friends. He is just a salesman.

Q. But it is a small town community, isn't it? A. Kingston is a large town community.

Q. Herzog's—

The Court: Kingston is the county seat of Ulster County.

The Witness: That is right.

The Court: People think it is a big city, if they live there.

Joseph Juliano—a Defendant—Cross

Q. You were asked before whether you ate with the men or you didn't eat with the men when you were at the farm. Which was it? A. I don't recall.

Q. Do you recall eating in a restaurant? A. I don't recall.

Q. You just don't recall where you ate? A. That is right.

Q. Did you ever shop while you were down there? A.

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In many instances.

Q. Did you ever bring the food back to the house? A. Home in New Berlin.

Q. Did you ever bring it back to West Shokan? A. I probably went back there with it, but I didn't leave it there.

Q. You never gave them any food? A. I don't think so.

Q. You either think so or you don't. A. I didn't.

Q. You didn't ever give them any food? A. No.

Q. When you say you didn't think so, you mean you know you didn't? A. I know I didn't.

Q. Did you ever cook for yourself there? A. I do—I did.

Q. Did you cook for yourself at the time that they were there? A. I didn't do much cooking. Coffee is what we call cooking.

Q. Did you eat while you were there on February 9, 10 and 11? A. I don't recall.

Q. Do you recall whether you ate at all? A. No, I don't.

Q. You didn't eat anything? A. I probably went out and ate. There are restaurants around.

Q. How far away is the nearest restaurant? A. There is one a mile and a third—no, two miles away. There is

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another one three miles away. That's enough.

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Q. Did you go into these restaurants morning, noon and for dinner? A. No.

Q. So sometimes you ate at the house? A. I don't recall whether I ate at the house or whether I ate out.

The Court: Didn't you tell me this morning that you ate at the house, that you had supper at the house?

The Witness: I don't recall whether I ate at the house.

The Court: Didn't you tell me this morning you had supper at the house on one or two occasions, and had breakfast?

The Witness: I probably did. Breakfast consisted of coffee.

The Court: Did you eat at the house? Did you have supper at the house?

The Witness: If coffee is considered eating, then I did.

The Court: Did you have supper at the house?

The Witness: I don't recall, your Honor. Probably I did.

Q. Did you ever have anything more than a cup of coffee? A. Such as?

Q. Anything more than—

The Court: Spaghetti with meatballs?

The Witness: No, not at the farm.

The Court: Did you ever eat spaghetti and meatballs at the farm?

The Witness: No.

The Court: Did you ever have latte?

Mr. Chapman: Italians don't eat spaghetti and meatballs, only Americans.

Q. Did you ever eat latte at the house? A. What.

Q. Did you ever have latte at the house? A. Yes, I did have milk at the house.

Q. At West Shokan? A. Yes.

Q. When you had—when you were there on February 9th, 10th, 11th. A. I don't know whether it was 9, 10 or 11 or any other time. I had a glass of milk there at times.

Q. Did you ever eat proloni? A. What?

Q. Proloni, is that? A. I don't know. I don't know what that is.

Q. Did you ever eat carni at the house? A. That would be meat.

Q. Did you ever have that at the house? A. I can't recall.

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Q. Did you ever have macaroni at the house? A. No.

Q. Did you ever have cake at the house? A. Possibly, yes.

Q. So you can recall whether you had coffee, and can recall whether you had milk, and you can recall whether you had cake, but you cannot recall whether you had any meat or anything else? A. That is right, because, I mean, cake and coffee, you will have, but a full meal, you will have to have it out.

Q. Did you ever look in the icebox? A. I didn't have any occasion to.

Joseph Juliano—a Defendant—Cross

Q. Never had any occasion to go to the icebox to get milk? A. No.

Q. Never had any occasion to go to the icebox to get coffee? A. No, ice—coffee you don't put in the icebox.

Q. Did you ever see any of these men cooking? A. Yes.

Q. Did they invite you to stay for dinner or for whatever meal they were eating? A. I don't recall. They probably did.

Q. And didn't you? A. I don't recall. Probably I did.

Q. You wouldn't definitely say that they did not invite

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you? A. I wouldn't say definitely, no.

Q. As a matter of fact, you were on pretty friendly terms with them, weren't you? A. To a certain extent.

Q. When you say to a certain extent, you were on friendly enough terms with them to go down and do them a favor and get a telephone set and telephone wire 20 miles away, at Kingston? A. That was business, not a favor.

The Court: You didn't make any money on it, did you?

The Witness: No.

Q. Then it wasn't business, it was a favor? A. OK, so it's a favor.

Q. You say when you turned around and drove home in a panic you were a mile away, is that right? A. Yes, approximately.

Q. Didn't Mr. Ginanatasio ever ask you why you had turned around and run away on February 16? A. Sure. I told him the same thing I told you.

Q. If you were a mile away when you turned around, Mr. Ginanatasio couldn't see you from the house, could he?

Mr. McAuley: Objection.

A. Positively not.

Q. Did you go right home that day? A. Yes.

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Q. Did you drive faster back than you had coming down? A. I don't recall.

Q. How long did you sit in the office when you were down in Newburgh? A. Roughly from 4—four hours.

Q. Didn't you say before it was about six hours? A. Six hours, all told, OK.

Q. All that time you were in the same room? A. I don't recall. I won't make a statement on that six hours. Maybe the six hours was in two visits, but four is sure.

Q. All that time you were in the same room? A. Yes.

Q. Where is the Newburgh office? A. Basement of the Post Office.

Q. You went down there to get your jacket, is that right? A. No, I went down there because I was requested to go down there by Mr. King.

Q. When you got down there you complained and you asked for your jacket? A. I didn't ask only for the jacket. I asked for a number of things.

Q. You were in there four hours? A. Yes.

Q. And the agents denied they had your jacket? A. That is right, they denied they had anything.

Q. How big was that room? A. It was a fair size room.

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Q. About how big? Look at this courtroom. A. Let's see. It is, oh, probably 12 in width and by about 20 long and it had—it has desks, desk here, desk there, desk there, and then they had a bunch of filing cabinets in front of

the windows. What I am getting at, they had a tree in the corner, kind of shielded by the filing cabinets.

Q. So then it was a fairly small room? A. Yes, not too large.

Q. In that room there were a number of people, is that correct? A. Yes.

Q. You stayed there for four hours? A. Yes.

Q. All during that time the agents denied they had your jacket? A. Yes.

Q. When did you see your jacket? A. Well, we were talking, and long talk, you get weary and start moving around, and you glance around, and I spotted the jacket hanging over on the tree.

Q. You mean while you were sitting down? A. I was sitting down. I got up and I sat down again.

Q. In other words, the jacket had been hanging on that tree all that time? A. Yes.

Q. Yet you tell us now the agents denied they had the

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jacket? A. Yes.

Q. You said also that the agents browbeat you, is that right?

Mr. McAuley: Objection.

A. I don't follow you.

Mr. McAuley: Objection. There is no such testimony.

The Court: I don't think there is any such testimony.

Mr. McAuley: "Browbeating."

Q. You said that the only gentleman was Mr. King. A. That is right. I still say it again.

Q. I asked you now whether the other agents browbeat you in any fashion. A. I don't know what you mean by browbeating.

Mr. McAuley: I object to "browbeating." The specific words given by the witness—

The Court: He answered. He says he doesn't know what he means by browbeating.

Q. Did anybody ever hit you? A. Oh, no.

Q. Did anybody strike you? A. Oh, no.

The Court: Do you expect to be much longer, Mr. Frank? I don't want to hurry you, but if you will, we will take the afternoon recess of five minutes.

Mr. Frank: May we have the recess, your Honor?

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The Court: We will take a five-minute recess.

(Short recess.)

By Mr. Frank:

Q. It is your contention then— A. I beg your pardon?

Mr. Frank: Withdrawn.

Q. I ask you whether any of the agents threatened to hit you in any way? A. Never.

Q. Nobody threatened you with physical violence, is that right? A. No, sir.

Q. Did they ever threaten you with anything? A. What do you call a threat?

Joseph Juliano—a Defendant—Cross

Q. You know what a threat is.

The Court: Did they ever say to you that if you didn't do something, something will happen to you?

The Witness: Yes.

Q. What did they say? A. They wanted me to identify some pictures. They put pictures in front of me.

Q. And they wanted you to identify those pictures? A. And put words, around, you know, "This is the guy."

Q. What did they say? A. That, exactly that. They wanted me to identify pictures I don't know.

Q. And that constitutes a threat to you, is that right? A. What do you call a threat? I don't know. I answered your question.

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Q. That is the only way they threatened you? A. Or I would be put in the middle. That is a threat.

Q. On all the time you have been at the farm, whenever you got to the farm, that these men were there, you never saw anything suspicious, did you? A. Never.

Q. You never smelled any odors? A. Never.

Q. You never heard any sounds? A. Never.

Q. Never saw any trucks? A. Never.

Mr. Frank: No further questions.

Mr. Chapman: May I ask a question or two?

The Court: Yes, Mr. Chapman.

Now Mr. Chapman's turn, Mr. Rader, and then you may conduct redirect.

Joseph Juliano—a Defendant—Cross

Cross Examination by Mr. Chapman:

Q. Mr. Juliano, do you see Mr. Giallo and Mr. Valente there, my clients? A. Yes, I do.

Q. Will you please tell the Court and jury when for the first time you ever saw them, fixing the date by reference to events or to time, month or year, if you can. A. I met these men after my arrest.

Q. Would that be— A. And my—their faces became familiar to me just as if I had known them a long time, from the pictures that were waved in front of me.

Q. You were arrested sometime in 1950? A. March—I believe it was about—some later date than the raid. Maybe

five, six or about ten days later.

Q. Let me tell you: It has been testified to here— A. I don't know the exact date.

Q. —that the indictment in this case was handed down on March 29, 1951.

The Court: March 28.

Q. (Continuing) March 28, 1951. Did you meet my clients outside for the first time or for the first time in this court, downstairs? A. We met in the court.

The Court: You are correct, it is March 29th.
Mr. Chapman: Thank you. I thought so.

A. I met all the defendants in the court house. At no other place.

Q. Was that after you came to plead to the indictment or after your arrest? A. Well, after—I think we had a general meeting down here before an indictment—

Q. What do you mean a general meeting? A. Everybody was here.

Q. You mean in the court house? A. Everybody involved in that charge.

Q. Where did that take place? You mean, a general meeting, you mean you all came together? A. Yes, we were all notified to report all at one time.

Q. Where did that take place? A. I believe it was in this building.

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Q. At any rate, the first time you met was in this building? A. Yes.

Q. Did you have any occasion to speak to either of my clients at any time on your farm? A. I have not.

Q. Did you ever see them on your farm? A. I did not.

Q. If you happened to be arrested in 1950— A. Yes.

Q. —and you didn't see them except in the court house— A. Yes.

Q. —did you have occasion, if you recall, to be notified or subject to notice that you will have to come to this court house any time before March 29, 1951? A. I don't remember that, counselor.

Q. As I told you, the indictment was handed down on March 29, 1951, as appears from the stamp on it. A. 1951, that is just last spring.

Q. That would be a year ago last spring? A. A year ago last spring, quite right.

Q. Do you now say with reference to the date that you met my clients at any time in this court, court house, before March 29, 1951? A. No, before I had not met them. First time I met them was in the court house.

Q. And not before you were called to plead to this indict-

ment? A. That is right. That was the only occasion I had

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to get here.

Mr. Chapman: That is all.

The Court: Now Mr. Rader?

Cross Examination by Mr. Rader:

Q. Mr. Juliano, you have testified today that on several occasions after you rented the farm at West Shokan you returned to the farm from New Berlin. A. Yes.

Q. And that was December 1949 or January 1949— A. Well, yes.

Q. 1950. A. Yes.

Q. December 1949, January 1950. A. Yes, some time around there.

Q. You testified on several of the occasions that you came back to the Juliano farm you saw a young man on the farm. A. Yes, sir.

Q. Is that right? A. Yes.

Q. Was that young man Sam Schifano, Jr.? A. No.

Mr. Rader: Stand up.

(Defendant Schifano stands.)

The Witness: No.

Q. When you say "young man" you are not referring to Sam Schifano, Jr.? A. No, I am not.

Q. Did you ever see Sam Schifano, Jr. on the Juliano farm at any time? A. I did not.

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Q. Did you ever see him in the vicinity of the farm at any time? A. I did not.

Q. Did you know Sam Schifano, Jr. in December 1949? A. I did not.

Q. When was the first time you saw Sam Schifano, Jr.? A. I met him in this court house same as I met the rest of them. I think, as a matter of fact, he was the last one of the arrests to get here.

Q. At the time you appeared to plead to the indictment? A. Yes.

Mr. Rader: No further questions.

Redirect Examination by Mr. McAuley:

Q. Mr. Juliano, at the time you went for the telephone, that you have been speaking of, did you make a special trip or was it on the way you were going any way? A. No, it was on the way I was going anyhow.

Q. Since February 1950 to the present time have you been employed? A. Yes, I have.

Q. Where are you working now? Where have you worked in the interval? A. The little service station that I had leased and later purchased I sold in June of this year, and I moved back—

Q. June of 1952? A. Yes, June of 1952, and I moved back to West Shokan.

Q. To whom did you sell the gas station? A. To John

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Harris, who is a local resident of New Berlin.

Q. Did you operate that gas station— A. I operated it.

Q. —from February 14 until June of this year? A. Yes, I did.

Q. Did you have any partners? A. Yes, I did.

Q. What did you pay for the gas station? A. I took it on a lease basis with a total price of $5500.

Q. To be paid how? A. Paid monthly.

Q. Did you pay the purchase price monthly? A. No.

The Court: How is this material to the case, particularly on redirect examination?

Mr. McAuley: Well, your Honor is correct. More properly belongs in the direct. I had omitted to ask his employment up to the present time.

The Court: I am not going to preclude you from inquiring into this matter if you think it is material.

Q. And since June of this year have you been employed? A. Yes, I have.

Q. As what? A. As a cabinetmaker.

Q. For whom have you worked since June of this year? A. Well, when I finished with the garage, I moved the family back to West Shokan.

The Court: Back to the old farm?

The Witness: No, no, no. In the neighborhood of the old farm. And I went to work for the Hoe Corporation on the 1st or 2nd or 3rd of August. I went to work for the Hoe Corporation in Poughkeepsie, New York. My union man sent me down to Poughkeepsie, so I moved the family back to West Shokan so as to travel a little closer. I quit five weeks after, and I am now working for the Mission Wood Products of Kingston, New York.

Joseph Juliano—a Defendant—Redirect

Q. I show you these two pictures, which are Government's Exhibits 40 and 30 for identification, and ask you if you ever saw either one of the men whose likenesses appear in those pictures? A. Yes, both of them. I met both of these at the farm.

Q. Both of those men? A. This guy's name I don't know, but this one I do.

The Court: Indicating what one do you know?
The Witness: This one, Jack.
The Court: What is the number?
The Witness: 39.

Q. When did you see them? A. And 40, I know him, but I don't know his name.

Q. When did you see them at the farm? A. The one whose name I don't know, I saw him on the last occasion.

Would be—I don't recall the date.

Q. Am I correct that on February 13, 1950, you were not in the vicinity of West Shokan? A. February 13? I don't know.

Q. Did I not understand you that on February 9, 10 and 11 you were at the farm? A. Yes.

Q. Can you tell us whether or not you were at the farm February 13? A. I don't recall.

Q. Does it refresh your recollection by a reference to the fact that you said that on the 14th, I believe, of February, you signed a lease in a lawyer's office? A. Yes, in Norwich. That is the 14th.

Q. Does thinking about that help you to remember where you were the day before? A. No.

Q. Whether you were in a lawyer's office? A. I don't recall where I was. I don't even know what day it was.

Joseph Juliano—a Defendant—Redirect

Q. Mr. Juliano, on any of the several days before Labor Day and February 16th of—Labor Day 1949 and February 16, 1950, on those several occasions when you returned to West Shokan did you ever see any such truck as depicted on Government's Exhibit 14 on or about or near the premises of the Juliano farm? A. I did not. I did not.

Q. Had you from prior to December 1949 owned any

other real estate or property other than that farm?

Mr. Frank: I object to this as improper redirect.

A. No.

The Court: It is improper redirect, but I will allow it. I don't know how it is material. Go ahead. He says no.

Q. Had you ever before rented any piece of property to anybody?

Mr. Frank: Same objection.

A. No.

The Court: Overruled.

Had you ever before rented anything from anybody?

The Witness: Yes.

The Court: Had you signed a lease?

The Witness: Well, the first time—when was that, before December?

Q. Any time in your life. A. Oh yes.

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The Court: So you weren't unfamiliar with the rental of properties, were you?

The Witness: I had rented from people?

The Court: Yes. Did you rent your garage over in Brooklyn? Did you have a lease there?

The Witness: Oh yes.

The Court: Did you have a lease on your apartment that you occupied?

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The Witness: No.

The Court: Did you have a gas station at any time before?

The Witness: Yes.

The Court: Did you have a lease on that?

The Witness: Yes.

Q. Have you ever lived in an apartment house or been a tenant in an apartment house in Philadelphia, for instance?

Mr. Frank: I object.

The Court: I think we have gone into this enough. I don't see the purpose of it. If you tell me, Mr. McAuley, that it is important, and you forgot to ask it on direct, I will permit it. I don't want to preclude you.

Mr. McAuley: I think it is material; about the same question your Honor asked the defendant.

The Court: Go ahead and ask him.

Mr. McAuley: Your Honor's inquiry—

The Court: Go ahead. Ask your question.

Q. You have been a tenant, have you? A. Yes, sir.

Joseph Juliano—a Defendant—Redirect

Q. Have you been a month-to-month or on a lease? A. Month-to-month.

Q. Have you signed leases for landlords? A. Only for business properties.

Q. You mean not for a dwelling? A. Never.

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The Court: When you rented this house, did you intend and did you rent the barn to these people, the use of the barn?

The Witness: Yes, I did.

The Court: And did you intend to rent and did you rent the house to them?

The Witness: Part of the house, I did.

The Court: What part of the house did you keep for yourself?

The Witness: Just the one room upstairs where I had my—

The Court: One room upstairs?

The Witness: Yes, sir, and, of course, the garages and the tool shed didn't go with the rent.

Q. Prior to February 15, 1950, Mr. Juliano, were these papers, Government's Exhibits 30, 33, 31 and 36, your personal property? A. Yes, sir, it was.

Q. Was the revolver your personal property? A. Yes, it was.

Q. Will you please enumerate any other items which were your personal property which you did not find in the residence, dwelling part of the house?

The Court: Any objection?

Q. (Continuing) When you returned there after February 15, 1950.

—741—

Mr. Frank: I object.

The Court: Objection sustained. I think we have gone into this matter sufficiently enough.

Mr. McAuley: You may examine—one more question, please.

Q. Did anyone, Mr. Juliano, connected with this case, on the side of the Government, ever ask you to involve any person? A. Yes.

Mr. Frank: I object to that, if your Honor pleases, leading.

The Court: Overruled.

Q. Who? A. Who involved or who asked me?

Q. Who asked you to involve somebody in this case? A. The agents.

Q. Do you know who specifically—can you tell from these photographs, or any of them, can you tell from any of these photographs just who you were requested to implicate? A. None of these there.

Mr. Frank: I object as improper redirect.

A. (Continuing) None of those there.

The Court: Overruled.

A. (Continuing) None of those there.

The Court: When you say you were asked to involve, did any of the officers and investigators tell

you that they wanted you to make an erroneous and

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spurious identification?

The Witness: That all depends on the way I put it.

The Court: Did they say to you—

The Witness: Yes.

Q. Will you state what their exact words were? That should bring it out. A. There were some pictures placed before me on their desks and they asked me if I knew any of them. So there were two, at least two, that I did know from a few years back, and I truthfully told them I know those people, but I don't know those in any connection here.

Q. All right. A. Then there was a particular one that they wanted me to pick him out, just to pick him out, wrong or right. That is as far as I will go there.

The Court: Did they say pick him out right or wrong?

The Witness: They wanted me, but I didn't.

The Court: Did they use—

The Witness: Yes.

The Court: —those words—

The Witness: Yes.

The Court: —"Pick him out right or wrong"?

The Witness: Yes.

The Court: What did you say?

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The Witness: I said, "I will not."

Q. Let me ask you, had you ever, prior to 1950, been

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associated in any way with the Alcohol Tax Unit and Treasury Department? A. Prior to what date?

Q. 1950. A. Yes.

Q. Had you ever appeared as a witness, not a defendant— A. Yes.

Q. —on any charge, but as a witness on the side of the Government? A. Yes.

Q. At the request of treasury agents? A. Yes.

Q. When and where? A. Well, the exact dates I don't recall, but you have the papers.

Q. I am not asking for the exact date. Five years ago, ten years ago. A. No, it was 1945 or 1946. I don't recall.

Q. And in which court house did you appear? A. In Brooklyn, Washington Avenue.

Q. Did you testify? A. I testified for the Government.

Q. Have you been trying to state what you were shown pictures— A. Of those same people.

Mr. Frank: I object to the leading of the witness.

Mr. McAuley: Withdraw the question.

Q. At the time you were shown these pictures by these

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agents in this particular case after March 1, 1950, were any of the pictures shown you pictures of men who had been defendants against whom you had testified in 1945 and 1946? A. The pictures that I was shown?

Q. Yes. A. Yes, they were. There were at least two or three.

Mr. McAuley: That is all.

Joseph Juliano—a Defendant—Recross

Recross Examination by Mr. Frank:

Q. And those were the men who were customers of yours, is that right? A. Yes, they were.

Q. Now, getting back to your farm for a second, you said you couldn't make a go of it, is that right? A. Yes.

Q. You lost money on it? A. Well, yes.

Q. You were out of a job until you leased— A. Oh, no, I was never out of a job.

Q. —until you leased the gas station, you were working for yourself? A. I worked every day in my life.

Q. Until you leased the gas station you said you worked for yourself, is that right? A. That is right.

Q. Doing odd jobs? A. Yes.

Q. You weren't making too much money, though? A. That's right, I was out of a job.

Q. But you weren't making too much money, though? A. No.

—745—

Q. As a matter of fact, you had to move from West Shokan to New Berlin because you weren't making too much money—enough money to live on? A. Well, no.

Q. Were you make a sufficient amount of money to keep your family? A. I was not.

Q. So you had to move? A. I didn't have to move.

Q. So you moved because you weren't making enough money in West Shokan? A. No, I had to go up and do some work up there and that is how I come to go to New Berlin.

Q. Nevertheless, right after you rented the barn and the premises you had enough money to sign a $5500 lease, is that correct? A. (No answer.)

Q. Is it or is it not correct? A. No.

Joseph Juliano—a Defendant—Redirect

Q. By the way, Mr. Juliano, do you always sign your business leases on the back of business cards? A. Business cards?

Q. Yes. A. No. My business leases? My lawyers draw—

Q. You had lawyers to draw up your leases? A. That is right.

Q. But when you leased the farm you leased it on the back of a business card, is that right? A. Certainly. I don't have a lease on my house.

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Redirect Examination by Mr. McAuley:

Q. By the way, when you went to New Berlin in around Labor Day, 1949, did you obtain immediate employment? A. Well, yes.

Q. With whom? A. I went to work for Scintilla Magneto in Sidney, New York.

Q. How do you spell that, S-c-i-n-t-i-l-l-a? A. Yes.

Q. For how long a period—

Mr. McAuley: Withdrawn.

Q. What was the nature of your work for them? A. Nature of the work was silver solderer.

Q. How long were you—how far away from your home in New Berlin was the plant of Scintilla Magneto Company? A. 30 miles.

Q. Did you make that round trip every day? A. Daily.

Q. And how long were you employed by that company? A. I quit after five weeks, approximately five weeks, of my own accord.

Q. For any particular reason? A. No particular reason.

Q. Then what did you do? A. Well, I had started some

work on the farm and I continued it. I am speaking of Russet Dairy Farm.

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Q. In New Berlin, New York? A. Yes.

Mr. McAuley: That is all.
The Court: Any other questions?

(No response.)

The Court: All right, step down.

(Witness excused.)

* * * * *

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New York, October 27, 1952;
10.00 o'clock a. m.

Present:

Mr. Frank,
Mr. Chapman,
Mr. McAuley.

Mr. Frank: May I make a statement for the record at this time, your Honor?

The Court: May you what?

Mr. Frank: May I make a statement at this time?

The Court: Yes, in a moment, Mr. Frank.

I asked you, Mr. McAuley, to embody your motion in papers and set forth your claims in affidavit form and serve them upon the United States Attorney. Have you done that?

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Mr. McAuley: Yes, sir.

The Court: May I have your papers then? I have not seen them yet.

Mr. McAuley: The original was filed with the clerk.

(Papers handed to the Court.)

The Court: The record will show that the attorney for the defendant Juliano has submitted to

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the Court a notice of motion dated October 22, 1952; annexed thereto is an affidavit of the defendant Joseph C. Juliano sworn to October 22, 1952, and the affidavit of Harold J. McAuley annexed to the notice of motion sworn to October 22, 1952.

Is there any answering affidavit submitted by the Government?

Mr. Frank: Yes, your Honor.

(Papers handed to the Court.)

The Court: There has also been filed an affidavit in opposition by Julian A. Frank, sworn October 22, 1952.

Now I will hear you, Mr. Frank.

Mr. Frank: If your Honor please, my answering affidavit states that a diligent search has been made for the original of the search warrant and that it cannot be found. I am prepared to introduce testimony unless Mr. McAuley and Mr. Chapman will stipulate that the search warrant, the original search warrant cannot be found—

The Court: The burden in the first instance is

not upon you; that burden is upon the defendants, and we will hear them first.

Have you any evidence that you desire to submit in support of this application that you have made?

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Mr. McAuley: Yes, sir.

The Court: Call your first witness.

You understand, Mr. McAuley, that I am proceeding with this hearing solely to give you the opportunity to make such record as you desire.

Mr. McAuley: Yes, sir.

The Court: That I have felt from the very beginning that your application has not been timely made and that the Court should not entertain it, and that the sole object of receiving evidence and hearing this motion at this time is to permit you to make such record as you desire.

The evidence upon the trial revealed that within two or three days after the raid, which I think, if my recollection serves me correctly, occurred on February 15, 1950, the defendant Juliano was advised that property belonging to him was in the possession of the agents of the Alcohol Tax Unit, and that that property had been taken from what was known as the Juliano farm which he had rented.

So that the defendant long prior to the indictment, well over a year prior to the indictment, was advised that papers and documents which he says belonged to him were taken by the Alcohol Tax Unit

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agents. There was ample time within which to move for suppression of that evidence and the Court determines that you did not do so.

Mr. Frank: We can save a little time, your Honor—

The Court: I do not know that we can save any time at this time, Mr. Frank.

Mr. Frank: The statement that I wish to make is that although the original was lost that the Commissioner has been able to find a copy.

The Court: I suggest that you hold your papers now and at the proper time you may introduce a copy if you cannot find the original.

Mr. McAuley: I respectfully except to your Honor's ruling, and I hope that your Honor will be good enough to read my memorandum. I rely in this case on behalf of the defendant Juliano on the Gouled case and on the Ganci case in this circuit, and I believe on the facts in this case, as brough out on the trial, that this is a perfect case wherein an application such as is brought here is timely. I think that the record indicates that the papers were kept a dark secret by the Government until the trial—

The Court: They were not kept a dark secret. There was testimony here by one agent that he had

shown them to Juliano and had questioned him about them.

Mr. McAuley: That is what I dispute, your Honor.

The Court: All right, call your first witness. My recollection is that there was no such testimony. Call your first witness.

Mr. McAuley: Mr. Carroll.

Motion to Suppress

Walter S. Carroll—for Defendant Juliano—Direct

WALTER S. CARROLL, called as a witness in behalf of the defendant Juliano, being first duly sworn, testified as follows:

Direct Examination by Mr. McAuley:

Q. Mr. Carroll, I believe you are now and were in 1950 a supervisor in the office of the Alcohol Tax Unit. A. My title was investigator in charge.

Q. At the Washington Street office, is that correct? A. Yes.

Q. Will you kindly explain, Mr. Carroll, the routine of your office with respect to written reports as they may or may not be required to be turned into your office by investigators, whether daily, weekly or in monthly form, or whatever the procedure was which obtained in February 1950. A. Well, in the first place, investigators make out a daily report of their daily activities. If in the course of their investigation they find any leads which would tend

to indicate a violation of the Internal Revenue laws, they immediately proceed with the investigation. Occasionally progress reports are made. Eventually, if the basis of the information or evidence that they find is sufficient, and if the circumstances warrant it, they apply to the United States Commissioner for a search warrant. They prepare affidavits and present them to the United States Attorney. If the facts are sufficient in the opinion of the United States Commissioner a search warrant is issued.

Q. Now, assuming that a search warrant is applied for, or was on February 14, 1950, was applied for in the office

of the United States Commissioner for the Southern District of New York by some of your investigators addressed to your Newburgh office, would they in due course be required to make a report to you of that fact? A. Either verbally or sometimes in writing. In this particular instance, I have a group head in the Newburgh office, Investigator King at that particular time, and Investigator King is an experienced investigator—I might say one of the best in the country. He has good judgment, he knows evidence, he knows probable cause and—

Q. Assuming that, Mr. Carroll, after the passage of time,

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having exercised his good judgment, do the regulations of your office require Investigator King in due course to make a report of the fact that the search warrant was applied for and obtained? A. All of that report is embodied in the case report. All that information, everything pertinent, is embodied in the case report.

Q. Are the affidavits of the swearing agents embodied in the case reports? A. The affidavits are not necessarily embodied.

Q. Can you now produce the affidavits which were allegedly sworn to by Investigators Lane and Perkins? A. No, that affidavit would be in the possession of the United States Commissioner.

Q. What are the requirements, if any, with respect to copies? A. Well, there are no requirements on that except that they be sufficient to satisfy the United States Commissioner.

Q. I am not talking about the contents of the original affidavit; I am talking only of copies. Can you tell me

what the requirements are with respect to copies? A. There is no stipulated number of copies of an affidavit required.

Q. Is there any copy required? A. Not for my report.

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Q. According to the rules of your office A. Not for my report.

Q. So if I understand you then, your department cannot produce any copy of the affidavits of Investigators Lane and Perkins allegedly sworn to on February 14, 1950? A. I do not have them at the office and I do not believe there is a copy of it in the case reports.

Q. I see. Is your office in New York required to furnish reports regarding search warrants to the Washington office? A. No, sir.

Mr. McAuley: That is all.

The Court: You have no cross-examination?

Mr. Frank: No cross-examination.

The Court: All right, next witness.

(Witness excused.)

Mr. McAuley: Mr. Lane.

BENJAMIN L. LANE, called as a witness on behalf of the defendant Juliano, first duly sworn, testified as follows:

Direct Examination by Mr. McAuley:

Q. Mr. Lane, will you state the circumstances under which on February 11th, I believe it was, sometime toward

the afternoon or evening, that you left the car driven by

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Investigator Perkins, with whom you had been previously riding, and proceeded to walk in the direction of the Juliano farm. A. Do you want me to start with the time that I got out of the car?

Q. Yes. A. Well, I got out—

Q. When you got out of the car at that time on that particular road.

The Court: What is the point of this?

Mr. McAuley: I want to establish, your Honor, that on that date, the date of February 13th, prior to the warrant, the application for the warrant, that this investigator had neither personal knowledge of the commission of a felony by the defendant Juliano, or at that time any probable cause to believe—

The Court: The question is whether he had probable cause to believe that a crime was being committed on the premises before he had applied for a search warrant.

Mr. McAuley: That is correct.

The Court: Whether Juliano was there or not is immaterial at the time.

Mr. McAuley: That is correct.

The Court: And whether he had knowledge that Juliano knew about it or not is immaterial.

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Mr. McAuley: Very well, your Honor.

The Court: The question is, did he have probable

cause to believe that a crime was being committed at that time. Now, I do not see that that is material evidence in this case except perhaps if we cannot find the original affidavits which were submitted in support of the search warrant—

Mr. McAuley: I do not believe that they can find it.

The Court: You say that you have been able to get a copy?

Mr. Frank: Yes, I have.

Mr. McAuley: Of the affidavits?

Mr. Frank: Yes.

The Court: Show it to Mr. McAuley.

(Mr. Frank hands papers to Mr. McAuley.)

Mr. McAuley: May I examine these, your Honor?

The Court: Who did you get the copy from?

Mr. Frank: From Commissioner Platt, your Honor.

By Mr. McAuley:

Q. Mr. Lane—

The Court: Wait. Have you looked at those papers?

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Mr. McAuley: Yes, your Honor.

The Court: Are you willing to accept them as true and accurate copies of the search warrant and

of the affidavits which were submitted to Commissioner Platt in support of the search warrant?

Mr. McAuley: Yes, your Honor, with the observation that they are not two separate affidavits. There appears to be—

The Court: Whatever is there—I have not seen the papers.

Mr. McAuley: Yes, sir.

The Court: Do you offer them in evidence, Mr. Frank?

Mr. Frank: Yes, I do.

The Court: Received as Government's Exhibit 1 on this motion.

Have you two copies?

Mr. Frank: There are two papers.

Mr. McAuley: One affidavit.

The Court: What is that other paper that Mr. Frank has?

Mr. McAuley: Just a description.

The Court: All right, mark them both in evidence as Government's Exhibit 1 and Government's Exhibit 2 on this motion.

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(Marked Government's Exhibits 1 and 2.)

The Court: You do not contend, Mr. McAuley, do you, that this affidavit of Benjamin L. Lane, sworn to on February 14, 1950, which has been marked Government's Exhibit 2 on this application, does not set forth facts stating probable cause for the issuance of a search warrant?

Mr. McAuley: Yes, I do, your Honor.

The Court: You do? All right. It seems to me then that this is simply a matter of law that is presented here.

Mr. McAuley: Your Honor, I have an opportunity now to test the credibility of this witness.

The Court: Suppose this affidavit was false, how would that affect the validity of the search warrant, the validity of the issuance of a search warrant?

Mr. McAuley: If the affidavit is false? In a sense that it was unlawful—

The Court: I think that it contains sufficient allegations that presented probable cause that the Commissioner was in law bound to act upon them and that he legally did so.

Mr. McAuley: That is the question, your Honor, whether it was sufficient on its face.

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The Court: Do you maintain that it is insufficient on its face as a matter of law?

Mr. McAuley: I have only had time, your Honor, for a few seconds to look at it. My first desire is to cross-examine this witness.

The Court: First I would like you to take your time and examine that and then tell me whether you consider that this affidavit on its face is insufficient in law and fails to show probable cause sufficient to justify the issuance of a search warrant.

Mr. McAuley: Yes, your Honor. Yes, I make that contention and I would be glad to state the reasons.

The Court: What are the reasons?

Mr. McAuley: It appears that contrary to the sworn testimony at the trial, there was one, not two—

The Court: You did not understand my question correctly.

Mr. McAuley: Yes, your Honor.

The Court: I asked you whether you contend that this supporting affidavit or this affidavit upon which the search warrant was issued was insufficient on its face as a matter of law.

Mr. McAuley: Yes, your Honor.

The Court: Point out to me in what respect you

maintain that it is insufficient on its face as a matter of law.

Mr. McAuley: Very simple, it fails to state, your Honor, what period of time, if any, the agent on the 13th was in or about that farm.

I have cases which hold that the mere smelling of mash is wholly insufficient. There are cases—the Lipne case in this circuit, and in that case there were three different observations for protracted periods of time on a farm premises. The Court held there that where you have some other circumstances plus observations over a protracted period of time on three different occasions by agents, plus clandestine operations, of which I see no allegation here, that that is sufficient to spell out probable cause.

Compared to the affidavits and the facts in that case, this thing seems to me to be somewhat barren.

Motion to Suppress

Benjamin L. Lane—for Defendant Juliano—Direct

I find that there is no mention at all of an alleged lengthy observation, which Agent Lane swore to that he conducted on February 11, 1950. Then after telling about a lengthy observation on February 11th, he then went on to tell another lengthy observation on February 14th—no, February 13th—and he told us that after those two observations, in effect, then that seemed to him to be enough of probable cause and he applied for a search warrant.

I would like to inquire of the agent further about the lack of anything like that in this alleged observation on February 11th.

The Court: I will let you inquire into that simply for the purpose of permitting you to make a complete record, but I do not see that it is at all material.

Mr. McAuley: All right.

The Court: And I want to say too that I observed this witness as he testified on the trial; I watched him as he gave his evidence, and I was impressed by his honesty and probity. He impressed me as being an extremely truthful, honest and fair witness. I accepted his testimony without any reservation of any kind.

By Mr. McAuley:

Q. Will you tell us, Mr. Lane, what the facts are with reference to the events of February 11th.

Motion to Suppress

Benjamin L. Lane—for Defendant Juliano—Direct

By the Court:

Q. Tell us what you did on February 11th with reference to this. A. On February 11th, with Investigator Perkins, I was in a Government car at Highland traffic circle, and about 4.30 p.m. I observed the green van-bodied truck bearing the sign A. Giollanno & Brothers proceeding north

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on Route 9W from Highland to Kingston.

Investigator Perkins and I then passed this truck and again saw the sign on the side, and drove to Shokan on the Maltbie Hollow Road. I got out of the car. This was after six o'clock when we arrived there. I don't know exactly what time it was, and I walked up the Maltbie Hollow Road and up the Watson Hollow Road, and as I was walking up, this same green van-bodied truck bearing license 138230 passed me.

It was apparently heavily loaded, and it proceeded into the Joseph Juliano premises. It had to shift in a very low low on account of the steep grade.

I observed the light flash on in the corner of the farmhouse which lit up the area. The truck backed up to the red barn on the Juliano farm premises, and then I heard voices and movement about the barn.

I then did not hang around long. I walked back to where Investigator Perkins was parked with the car, and got into the car and left. The truck went in about 6.50 p.m. into the Joseph Juliano premises.

By Mr. McAuley:

Q. Was it through inadvertence or because in your judgment it was unnecessary that you omitted that observation from the search warrant and from the affidavit? A. I just stated that I saw the truck go into Joseph Juliano

premises at 6.50 p.m.

By the Court:

Q. You did not put the various details in it? A. I didn't put in there that I walked half a mile.

The Court: All right.

The Witness: Or got out of the car and went up the hill.

By Mr. McAuley:

Q. Did you put in there that you smelled mash on February 11th? A. Not on February 11th, no.

Q. Did you put in there that you heard motors on February 11th? A. No, I did not.

Q. Did you put in there that you heard the clank of cans on February 11th? A. I did not. I did not stay—I stayed around for about five minutes and then left.

Q. I am not talking about staying around for five minutes; I am talking about that affidavit. A. In that affidavit I stated that I saw the truck go into the Joseph Juliano premises and saw it—

Motion to Suppress

Benjamin L. Lane—for Defendant Juliano—Direct

Q. But you did not put in that affidavit the rest of what you told at the trial you observed, to wit, the smell of mash and motors running— A. On February 13th I returned—

Q. I am not talking about February 13th. Please, I am

talking about February 11th. You did not put in that affidavit what you told this Court and the jury you observed with your senses on February 11th? A. I did not tell the Court that I observed anything with my senses outside of my eyes, seeing the truck go into the Joseph Juliano premises on February 11th.

Q. Is that your recollection— A. That is my recollection.

Q. Just a moment. Is that your recollection that at the trial just concluded you did not say that you smelled mash on February 11th when you were then at or near the vicinity of the Juliano farm? A. That is the best recollection I have and my recollection is the truth.

Q. I didn't say anything about the truth.

The Court: Do not conduct a little private conversation.

Q. Is it your recollection that you did not tell this Court and the jury that on February 11th while you were in the vicinity of the Juliano farm that in addition to smelling mash you heard motors running? A. I didn't.

Q. Is it your recollection that you did not tell the Court and jury that on February 11th you heard thuds? A. I did say that, yes.

Q. Do you recollect anything else that you said about an

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observation of your senses on February 11th in addition to thuds? A. Outside of the truck backing to the farm door I have no other recollection of saying anything else.

Q. Did you put the thuds in your affidavit? A. No, I did not.

Q. Your observations with respect to your senses with the exception of the trucks are confined to the day of February 13, 1950; am I not correct? A. Correct.

Q. Now, Investigator Lane, when did you first learn of the name Juliano especially in connection with the fact that Juliano was the owner of those premises? A. Sometime I believe in January or maybe before.

Q. Sometime when? A. Sometime in January or possibly before.

Q. Now, directing your attention to the hours between 5 p.m. and 1 a.m. on February 15, at the time you were in the living room in the evening, did you or any other agent or investigator in your presence question Lango, Cutugno or Bosco? A. Lango and Cutugno could not speak English.

Q. Bosco could? A. Bosco could, yes, sir.

The Court: What has this got to do with the legality of the search warrant?

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Mr. McAuley: I make the point in my memorandum, your Honor, assuming that the search was valid here, based upon the affidavits sufficiently to spell out probable cause, that the conduct of the agents with respect to the papers seized from Juliano was not legal.

The Court: In what respect?

Mr. McAuley: In respect of constituting an exploratory search of the sum total of a man's private papers and documents. There was a search warrant for evidence alone. It was a search for contraband.

The Court: The testimony was that these papers were lying openly exposed on a shelf of the desk and in view of anybody who entered into this living room or dining room where the secretarial desk was located. I accept that testimony as being correct, and if the defendant Juliano's testimony was contrary, I reject it as improbable and untruthful. Juliano impressed me as an untruthful and perjurious witness.

Mr. McAuley: Does your Honor—

The Court: I did not regard any of his testimony as being truthful and I do not do so now on this hearing.

Mr. McAuley: Does your Honor wish to let me proceed on this question?

The Court: Go ahead. I am going to let you make as full and complete a record as you desire. I am simply indicating my views on the matter.

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Mr. McAuley: Yes.

By Mr. McAuley:

Q. Now, excluding yourself, Investigator Lane, were there any other agents to your knowledge who touched or handled the papers that were in that desk sometime between 5 p.m. and 1 a.m. on the evening of February 14th

and the early morning of February 15th and the early morning of February 16th? A. I cannot answer that.

Q. When you were at the desk were you alone? A. At the time I was, yes.

Q. Can you fix that approximate time? A. Shortly after the arrest of Lango and Cutugno.

Q. When was that, five o'clock, 5.30? A. It was after five o'clock, after the warrant was executed.

Q. Between the hours of 5 and 1 a.m. how many of those total hours, those eight hours, did you spend in the living room at the dwelling? A. I do not know. I was in the still part of the time, back in the living room, and there were a number of other investigators about the area.

Q. I know, but I say how long a time— A. I can't answer that question.

Q. The question is, can you tell us approximately how

many hours or minutes you busied yourself searching for or examining the papers in the desk?

Mr. Frank: I submit that has already been answered.

The Court: Let him answer it again.

A. I don't recall.

Q. Can you tell us whether it was one minute? A. Yes, it was.

Q. Could you give us an approximate notion of how many papers you looked at? A. No, I don't recall. There were numerous papers there.

Q. Are you the one who extracted the five papers which were produced at the trial? A. I extracted some of them.

The Court: When you say "extracted" what do you mean?

Mr. McAuley: Selected.

The Court: I am asking the witness.

The Witness: I did not extract any. I picked up papers.

The Court: You mean that you selected papers?

The Witness: I selected the ones that I thought pertinent to the investigation.

The Court: From a pile of papers?

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The Witness: Yes.

The Court: Where were they?

The Witness: On a secretarial desk in this combination dining and living room.

The Court: Was the desk open at the time?

The Witness: It was.

The Court: And was the shelf down on the desk, the shelf that forms the writing part of the desk?

The Witness: No. No, there was—when I looked at it the papers were on top of the desk. There was no shelf.

By Mr. McAuley:

Q. Can you fix the time when you looked at it approximately? A. Maybe about 5.30.

Q. That was almost immediately after you went into the living room? A. I don't recall.

Q. Well, do you recall what time you entered the property to execute the search warrant? A. Around 5 o'clock.

Q. Does that refresh your recollection? Was it within

a half hour or thereabouts that you entered the living room? A. Within the half hour.

Q. And was that the first thing you did when you got in the living room, go to the desk? A. No.

Q. Did you either then or after or before search the remainder of the house, the rooms upstairs? A. No.

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Q. Did any other agents to your knowledge search the rooms upstairs?

Mr. Frank: If your Honor please, I object to that on the ground that it irrelevant and immaterial.

The Court: Overruled. I am going to let him answer.

A. I don't know what the other agents did.

Q. Did you or any other agent find any contraband or whiskey or cans in the house, in the dwelling house?

The Court: There is no contention by the Government that he did, but he may answer.

Mr. McAuley: I want it for the record.

The Court: Contraband might be anything used in connection with the operation of a still, and that is a matter of opinion.

Mr. McAuley: All right.

The Court: These telephones were used for that purpose.

Q. Did you find in the dwelling house any mash, yeast, raisins, still parts or appurtenances, partly filled or empty 5-gallon cans, in the dwelling house? A. I did not, but another investigator did.

Q. What is his name? A. Investigator King.

Q. All right. Was your search in the house confined

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to examining these papers in the desk? A. Plus the jacket.

The Court: It seems to be intimated in these moving papers by the defendant Juliano that certain property which was located in this house had been stolen, in plain words. It is intimated that they were stolen by the agents who entered into these premises.

Did you see anything about some silverware contained in a flannel bag or a red flannel bag that is described there?

Mr. McAuley: A red metal box, your Honor, with white letters, MAWLL.

The Witness: I did not.

The Court: No, Rogers plate silver in a purple or violet covered wooden box.

Mr. McAuley: I am sorry, your Honor, that is correct.

By the Court:

Q. Did you see any wooden box or wooden case of purple or violet containing any Rogers silverplate? A. I did not see any.

Q. Did any such article come into your possession? A. I never saw any such article.

Q. Did you see a .32 calibre Smith & Wesson revolver? A. I did not see a .32 calibre Smith & Wesson revolver.

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Q. Did you see a box of .38 calibre Smith & Wesson shells? A. I did not.

Q. Did you see a power saw of the brand Mawll in a red metal box with white lettering? A. I did not.

Q. Did you see a set of micrometers with the brand name Jarett? A. I did not.

Q. Did you take any property from this house or from the barn other than what has been introduced in evidence? A. Outside of papers, I did not, and the jacket.

Q. To your knowledge did any of the other agents with you take or steal or appropriate for their own use any of this property that I have enumerated? A. To my knowledge they did not.

By Mr. McAuley:

Q. Counting yourself, how many agents, investigators, special investigators and state troopers or other officers were there in and about that dwelling on that night approximately? A. There might have been 14, 15, 16, 18—I just don't recall how many there were.

Q. You are just answering for yourself and you do not tell us that you have any knowledge or that you were able to observe all of these 14 people throughout these seven or eight hours that they were on the premises, is

that correct? A. That is correct.

The Court: We will suspend for a few minutes.

(Short recess.)

Motion to Suppress

Benjamin L. Lane—for Defendant Juliano—Direct

By Mr. McAuley:

Q. Investigator Lane, before you selected these five papers that I referred to and which are Government's Exhibits in this trial, you searched for other papers, am I right? A. I handled other papers, yes.

Q. You looked at other papers? A. I looked at other papers.

Q. To observe what information if any was on the face of those papers? A. Yes.

Q. Can you tell us to the best of your recollection the nature of some of those other papers that you looked at? A. Oh, some were circulars, some letters, personal letters, I believe, and that's about all.

Q. And birth certificates? A. There may have been but I do not recall whether there were or not.

Q. Against these five that you selected how many were there approximately that you rejected?

Mr. Frank: I object to this, your Honor, as irrelevant and immaterial.

The Court: I do not see that it is material, but I am going to allow it.

A. I don't recall how many there were. There were quite

a number of papers there and I just selected the few that I thought were pertinent to the investigation.

Q. Approximately how long did it take you to search for these papers and examine them and come to the selection that you did? A. I don't recall the exact time.

Q. Approximately, a minute? A. More than a minute but I cannot tell you the time.

Q. A half hour? A. I cannot tell you.

Q. Will you please try and recollect?

Mr. Frank: I object to that.

A. I can't answer it, I can't tell.

The Court: He says he cannot tell.

A. (Continuing) I can't tell just exactly how long I took reading over these papers and selecting the ones I did select.

Q. Could you tell us whether it was longer or shorter approximately than the time that you have spent on the stand this morning? A. I can't answer that.

Q. Can you tell us where physically on the desk, if you know, there was a keyhole located? A. I cannot.

Q. Was Investigator King, in charge of the detail, working with you at the desk at any time between 5 p. m. and 1 a. m.? A. He was in the room at times but he was not working with me.

Q Was he examining papers at the desk with you? A. No, he was not.

Q. And you say that you selected some of these five papers. Do you know who selected the others? A. I don't know.

Q. Tell me, was this secretary desk what they commonly called a roll type desk with the lock at the bottom and not at the top? A. I cannot answer that. I don't recall just

what type it was, whether it was a roll top. I know there was a flat part of the desk—it was not a very big desk.

Q. You are familiar with these corrugated panels, are you not, that sometimes you see on these roll top desks? A. Yes, I am.

The Court: There is no testimony that this was a roll top desk.

Mr. McAuley: I am testing his memory, if your Honor please.

The Court: You see, Mr. McAuley, I think you are going far afield. I am not going to limit you. It is my recollection that the testimony was that it was an old type secretary desk. They used to call it a secretary, and we see that sometimes in living rooms even today. Roll top is not in the case at all by any witness including your own client when he testified and described the desk.

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By Mr. McAuley:

Q. Was there any connection between the writing part of the desk, any physical links or connection between the writing part of the desk and the main body of the desk? A. I am not clear on the writing part.

Q. Well, like links or chains. A. No.

Q. Did the top open? A. I don't recall how the top opened.

Q. Were you seated or standing as you examined or searched through these papers? A. Standing.

Q. Now, did you work at the desk before or after you saw this jacket which you described? A. Before.

Q. You were working at the desk before, is that correct? A. Yes.

Q. At that time do you recall where Mr. Lango was standing or seated in the room, if he was in the room?

Mr. Frank: If your Honor please, I feel that I must object to this whole line of questioning.

The Court: Objection overruled. I am going to let him go ahead.

A. I don't know whether Lango was in the living room or not.

The Court: Lango pleaded guilty, did he not?

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Mr. McAuley: Yes, your Honor.

The Court: Incidentally, I want to point out to you, Mr. McAuley, that these very valuable properties that you claim had pecuniary value and which were so securely protected, as you urge, were left from September until February 15 in a house that had been practically abandoned—from September until December, when it was rented to strangers.

Mr. McAuley: I did not say that it had any pecuniary value. I did not say they were valuable in a pecuniary sense.

The Court: This silverware that you intimated was stolen had some value?

Mr. McAuley: Yes, sir.

The Court: This saw that you say was worth $150 and which you intimated was stolen at the time of the execution of the search warrant you intimated as having a value.

Mr. McAuley: Yes, sir.

The Court: And the micrometers you indicated as having a value.

Mr. McAuley: Yes, sir.

The Court: Juliano did not impress me as the type of a fellow who would leave valuable property like that around in this almost abandoned farmhouse.

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Mr. McAuley: May the witness answer the question, please?

The Witness: Will you please repeat it?

Q. (Read.) A. Part of the time he was seated in the room that I know of.

Q. Was he not in the room without being taken from the room from approximately 5.30 to 1 a. m.? A. I don't know, I wasn't there all the time.

Q. You were in and out, is that right? A. I was in and out.

Q. When you were at this desk searching through the papers did you look under the desk? A. No, I did not.

Q. You tell us that you did not see within the desk at the time you were there a .32 calibre Smith & Wesson revolver? A. I did not.

Q. And you did not see a box of .38 calibre Smith & Wesson shells? A. I did not.

Q. Did you read the search warrant, Government's Exhibit 1, after it was issued? A. I did.

Q. And is there appearing on the face of that search warrant any reference to private papers?

The Court: Objection sustained; the exhibit speaks for itself.

Q. Now, did you, Mr. Lane, Investigator Lane, or to your knowledge any other agent ever seek to ascertain whether

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there was a septic tank on the premises of the Juliano farm?

Mr. Frank: I object to that.

The Court: Objection sustained.

Q. Did you ever seek to ascertain whether, with reference to another exhibit, there was any refrigerator belt or fan belt or any nipples or 1½-inch pipe as described in that invoice on the paper?

Mr. Frank: I object to that.

The Court: Objection sustained, as not within the purview of this application that is now being made, not in any way tending to affect this man's credibility.

Q. Can you tell us which of the five papers you yourself selected, and I will recite them: The septic tank invoice, the nipple and the pipe invoice, the telephone invoice, the notebook, and the piece of paper with the name Schick printed on it, which of those you selected? A. I cannot tell unless I see the paper itself.

The Court: His testimony is before the Court as to the papers he picked up. It is all in the record already at the trial.

Mr. McAuley: I am asking him now a few days later if he can remember.

The Court: He says he can remember if he sees

the paper.

Did you make a notation on these papers, on these exhibits?

The Witness: Every exhibit that I picked up I note the time and the place of seizure and put my name on it.

The Court: And therefore by looking at the papers you can refresh your recollection?

The witness: Yes, sir.

By Mr. McAuley:

Q. Am I correct, Investigator Lane, that at the trial just completed you testified that at no time did you exhibit any of these papers which you say you found in the jacket of Mr. Juliano to Mr. Juliano when you questioned him?

Mr. Frank: I object, if your Honor please.

The Court: Objection overruled. I will let him answer.

A. I did not show any of the exhibits to him on the day I questioned him.

Q. As far as you know, when you were present at any time prior to the time the first exhibit, the septic tank invoice, was offered at this trial, were any of those papers exhibited to Mr. Juliano?

The Court: To your knowledge.

Q. To your knowledge. A. I don't know.

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The Court: Did you question Mr. Juliano when you met him a few days after the raid or some weeks after the raid about the telephones?

The Witness: No, I did not.

Q. However, someone did question him about the telephones but without showing him the invoice, is that correct? A. I do not know what somebody else did.

Q. When, Investigator Lane, did you ascertain that the jacket belonged to Mr. Juliano? A. When I picked it up and saw his name in the jacket in the papers.

Q. When did you ascertain that he was the owner of the premises?

The Court: He has already told us that.

Mr. McAuley: I think probably it is a mistake.

A. The owner of the premises?

Q. Yes. A. I ascertained that prior to the securing the search warrant.

Q. You mentioned, I believe, a date in January, is that correct? A. No, not to the ownership of the premises, I did not.

Q. Well, will you give us the approximate date? A. I would say the morning of February 14th when I went to the County Clerk's Office to check up on the ownership.

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Q. Going back, after re-reading it carefully again, Investigator Lane, going back to Government's Exhibit 2, your reference to all you know about February 11th, that is contained there in a reference to a notification, am I

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correct, that you received from somebody else in this trial? A. Yes.

Q. You don't, as I believe you testified before, you don't in that affidavit testify to any personal knowledge or any kind or character or description which you yourself had on February 11th? A. Will you repeat that?

Q. You don't, do you, in that affidavit testify to a single iota of personal knowledge with reference to the Juliano farm or the appearance of a truck within that farm on February 11, 1950? A. No.

Q. Did you see a truck on the Juliano farm on February 11th? A. I did.

Q. Why isn't it in the affidavit?

Mr. Frank: If your Honor please, I object to that.

The Court: Objection sustained.

Q. Can you explain the omission of that observation from the search warrant?

Mr. Frank: Same objection.

The Court: Objection sustained.

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Mr. McAuley: Is that an improper question, your Honor? This goes to his credibility.

The Court: Objection sustained, Mr. McAuley. Next question. Many of your questions have been improper, but I have allowed them. I have allowed you great latitude in cross-examination.

Q. Referring to February 15, Mr. Lane, do you have any independent recollection of the weather toward the evening of that day?

Mr. Frank: Objected to, if your Honor please.

The Court: Overruled. I do not know what the purpose of it is, but let him go ahead.

A. It was cold.

Q. Do you recall approximately what time you and the others left your Newburgh office prior to going to the Juliano farm? A. No; Investigator Perkins and myself met the other investigators up there on Route 28.

Q. But where had you been before you met the others on that day? A. I believe we went to the Newburgh office.

Q. When had you left the Newburgh office? A. I cannot recall exactly now.

Q. Can you tell us the approximate time when you arrived at the Juliano farm? A. About 5 o'clock.

Q. And was it light or dark at that time? A. Light.

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Q. The sun had not set? A. That's right.

Mr. Frank: If your Honor please, I fail to see the materiality of this whole line of questioning.

The Court: I do not see it either.

Mr. McAuley: That is all for this witness, your Honor.

The Court: All right. You have no cross-examination?

Mr. Frank: I have no cross-examination.

The Court: Next witness.

(Witness excused.)

Mr. McAuley: Mr. King.

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Motion to Suppress

Vincent P. King—for Defendant Juliano—Direct

VINCENT P. KING, called as a witness on behalf of the defendant Juliano, being first duly sworn, testified as follows:

Direct Examination by Mr. McAuley:

Q. Mr. King, can you tell me whether or not on the evening of February 15, between 5 p. m. or thereabouts and 1 a. m. you were in the living room of the Juliano farm? A. I was in there and in the kitchen and out in the still.

Q. At any time did you search through the papers on the desk? A. I glanced at them; I didn't search for them.

Q. You glanced at some of the papers? A. I saw papers

on the desk and I saw Investigator Lane looking at them.

Q. You saw Investigator Lane looking them over? A. Yes.

Q. Did you see him searching through the papers? A. I saw him examining some papers, yes.

Q. Did you at all look at some of these papers he was examining or did you confer from time to time? A. He showed me the ones that he thought pertinent.

Q. How long did it take him to find the ones which he thought pertinent, do you know? A. I don't know exactly, no.

Q. Can you tell us approximately how long you were at the desk with him? A. I was not at the desk with him.

Q. Well, near the desk. A. Well, I was in the room several hours, in that room and in the kitchen.

Q. Can you tell us just when you were in the room for several hours and when you left the room? A. I didn't stay there all day.

Q. I didn't ask you that. Will you tell us when you were in the room and for how long, the approximate hours. A. No, I can't because I didn't stay there for a certain number of hours.

Q. Well, part of an hour? A. Sir?

Q. Can you give us a rough idea of the total amount of

time you spent in the living room between 5 o'clock and midnight—5.30 and midnight? A. I can estimate it. I was probably in there two hours out of that time.

Q. Was the living room lighted when you first went into the living room? A. Yes.

Q. What were the means of illumination when you first went into the living room? A. There were electric lights but I don't remember just where they were placed.

Q. Did there come a time when the only illumination of the room was provided by a lamp near the desk?

Mr. Frank: If your Honor please, I cannot see the relevancy, or materiality of these questions.

The Court: I do not either but overruled. He may answer if he knows.

A. I don't recall that.

Q. Do you have any recollection of the nature of any of these other papers? A. No, I do not.

Q. That Investigator Lane was looking at? A. No, I do not.

Q. Do you have any recollection of the desk, was it open from the top down or did it roll up and—

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Mr. Frank: If your Honor please, we object to that.

The Court: Overruled. Let him answer.

Do you remember?

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The Witness: It was a small desk on legs and I believe it opened from the top, not a roll type, a solid board, but I am not sure of that.

Q. With the top down? A. I believe so.

Q. Did it have a keyhole? A. I don't recall it. It was open when I saw it.

Q. Do you know if any other agents or state troopers had been in that room before you got there? A. Yes, but I don't know just who. I came in there about ten minutes after they entered the premises. I looked at the barn and then came in. There probably were several agents in there.

Q. Am I correct that when you entered the farm premises you observed people later known to you as Lango and Cutugno leaving the rear door of the dwelling and running away from the direction, in the direction you were going but away from you? A. That's right.

Q. Did somebody fire a shot in the air at that time? A. No.

Q. You heard no shot? A. I heard no shot.

Q. Did you thereafter catch up with Lango and Cutugno?

The Court: How is that material?

Mr. McAuley: The question is where he was from 5.30 on.

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The Court: Go ahead.

A. I was between the house and the barn.

Q. Did you not thereafter, after apprehending them, take them immediately into the living room of the dwelling? A. I did not apprehend them; they were apprehended by Investigator Miller.

Q. Were you there? A. I saw him apprehending them.

Q. Shortly thereafter did you come upon their presence or did you see them again? A. I came into the house about ten minutes later.

Q. Were they not taken into the living room? A. Yes.

Q. Did they not stay in that living room constantly without interruption from the time that they were taken in until the balance of the night? A. No, they were out in the kitchen.

Q. They were taken out in the kitchen? A. Yes. I photographed them and fingerprinted them out there.

Q. Were they taken back into the living room? A. Yes, they were in the living room part of the time.

Q. How long a period of time would you say they were in the kitchen? A. Oh, they were out there approximately three hours.

Q. And that was for fingerprinting and other things? A. Yes.

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The Court: Don't you think that we are wasting a lot of time?

Mr. McAuley: Possibly not.

The Court: What?

Mr. McAuley: Possibly not, your Honor.

The Court: Get down to something material.

Q. The balance of that time, am I correct, they spent in the living room? A. Not all of it. I was out in the barn looking around.

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Q. Not you, I am talking of the prisoners, they were being guarded by you and the other man, is that correct? A. Yes, that's right.

Q. Can you fix the approximate time of the evening when you were at this desk and when you saw Investigator Lane examining papers at the desk?

Mr. Frank: I object, if your Honor please.

The Court: Objection overruled.

A. I believe it was about 5.30.

Q. That would be just a few minutes or several minutes after you entered the house, is that right? A. About twenty minutes after.

Q. So am I correct that that was one of the first things, if not the first thing, that Investigator Lane did when he went into the house about 5.30? A. I don't know whether

he went in first because I didn't go in with him.

Q. Did you at any time up to October 15 question Mr. Juliano? A. I was up there—yes, he came in the office on February 27th.

Q. Who was there with you? A. Investigator Lane and Investigator Perkins.

Q. At that time or at any other time to your knowledge were any of the paper exhibits used by the Government in this case displayed to Mr. Juliano? A. No, I didn't question him at that time.

Q. Well, did others question him in your presence? A. Not at that time.

Q. There was no questioning at all on that date? A. I had some pictures on the desk, I showed him, that's all,

and we told him that the case had been assigned to special investigators—

Q. Mr. King, as far as you know, were any of the Government exhibits which were used in this case ever shown to Mr. Juliano in advance of this trial?

Mr. Frank: I object, if your Honor please. I do not see the relevancy or materiality of this.

The Court: If he knows he may answer.

A. I don't know.

Q. With respect to light and darkness, can you tell us the state of the day and the time you arrived at the Juliano

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farmhouse or premises at or about 5 p. m.? A. Daylight.

Mr. Frank: Objected to, if your Honor please.

The Court: Objection overruled.

A. It was daylight.

Q. Did you then or have you subsequently checked the official hour of sunset for that day?

Mr. Frank: I object to that.

The Court: Objection overruled.

A. No, I have not.

Q. Did you at any time see a Colt, not a Colt, a Smith & Wesson .32 calibre revolver in or about the desk of the premises? A. No.

Q. Or a permit for the same? A. No.

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Q. Did you have occasion to look under the desk at any time while you were in the living room? A. As I recall it, that was done later. I didn't see anything under the desk.

Q. Will you state as fully as you can recollect the conversation you had with Investigator Lane on that evening about a jacket, and state the time. A. He showed me the jacket and said some papers had been found in it.

Q. Can you fix the time? A. No, it was after roughly 6.30, 7.00 o'clock.

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Q. Before you attended to the fingerprinting? A. Yes.

Q. Did you see the papers in the jacket at any time? A. Yes, I saw them later on in the office and I saw papers he had there at that time.

Q. The question is, did you at any time see the papers in the pocket of the jacket? A. No, they had been removed when I saw them.

Q. How do you know? A. Well, I didn't see them in the jacket.

Q. You did not? A. No.

Q. As far as you are concerned, you don't know whether they were ever in the jacket or not? A. That's right.

Mr. Frank: If your Honor please, we went over that at the trial.

The Court: We will go over it again now.

Q. At the time of the conversation if any that you had with Investigator Lane after he found the papers, what was the conversation?

Mr. Frank: The same objection.

The Court: Didn't you go into this at the trial? Answer it if you can.

A. I don't recall the conversation; I know I had some conversation with him.

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Q. Did you read these papers at the time? A. No, I don't believe I did.

Q. Did he show them to you at the time? A. Yes.

Q. Did you look at them but not read them? A. I glanced at them. No, I didn't read them.

Q. At the time did you read on one paper one septic tank, $30? A. I don't recall that.

Q. At the time did you read on another paper the notation 1½ pipe nipples, $12 and some cents— A. I don't recall.

Q. What? A. I don't recall what was on the paper.

Q. Is it fair to state that you did look at them and observed the contents or that you did not? A. I did look at them but I don't recall what was on them.

Q. Do you recall Investigator Lane saying anything to you about these papers when he showed them to you? A. He said they were in the jacket.

Q. Did he say anything else? A. That he was going to take them in as evidence.

Q. Did he say anything else? A. That's all I recall.

Q. At the time you were in charge of the detail, is that right? A. That's right.

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Q. At that time did you inquire whether he had found any other papers in addition to the ones he showed you?

Mr. Frank: I object to this, if it please your Honor.

The Court: Objection overruled, let him answer.

A. No, I did not.

Q. At the time did you ask him if he had examined each and everything in the desk by way of papers? A. No, I did not.

Q. At the time you were interested, were you not, in having all of the papers examined that were in that desk? A. Yes, I was.

The Court: Mr. McAuley, you know, the evidence in this case left me with the impression that these papers which were taken from the farmhouse were not the personal or private papers of Juliano at the time they were taken on February 15, but that they were papers which were jointly owned by him and those with whom he acted in concert, and that they were in no way private papers, that they had been practically abandoned or turned over to the conspirators and left laying around in this farmhouse.

Mr. McAuley: I must take the point of view with reference especially to the septic tank and the others that that is not so because there was nobody at the trial—

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The Court: Well, I was left with that impression—

Mr. McAuley: —that could be—

The Court: —that these were papers that pertained to the conspiracy, and here they were practically discarded by your man, your defendant Juliano, or turned over to his confederates. My impression was that they had been left laying around—

Mr. McAuley: I don't know, your Honor. The fact that they were in physical possession at the time is not conclusive on us of whether or not they were his.

The Court: It is immaterial whether he was in physical possession or not. The question is whether they were his private papers or his property, or whether they were abandoned property or papers which had once come into his possession and had been turned over to others.

Mr. McAuley: All I know, your Honor, is that—

The Court: Here you have them found in a house which has been untenanted from September 3rd to December, nobody living in there, and then it was rented with a purpose which the jury found to exist to carry on a violation of the law.

Now common sense and common knowledge of the

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manner in which these still operations are conducted tells us that the premises are not maintained with the nicety and the cleanliness that one finds in a private residence or a home.

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Mr. McAuley: Of course, the nature of this inquiry waives that question of whether the papers were incriminating or not and moves to suppress them if they are incriminating.

The Court: You go ahead. I am going to let you make as complete a record as you can.

Mr. McAuley: Within reason?

The Court: Within reason.

Mr. McAuley: May I have the last question, please?

(Record read.)

Mr. McAuley: That is all.

By the Court:

Q. Did you see at any time while you were in these premises or later on, one complete set of Rogers plate silver in a purple or violet-colored wooden box? A. No, I did not.

Q. Did you hear of any such silver and such box or any other box being taken from this farm or farmhouse? A. No, I did not.

Q. Did you see at any time while you were in the house

or at any time after a red metal box with white lettering containing one power saw of the brand Mawll? A. No, I did not.

Q. Do you know anything about such a saw being in the house and being taken from the house? A. No.

Q. By either you or any of your agents? A. No, I do not.

Q. Did you at any time while in that house or any subsequent time see one complete set of inside and outside micrometers with the brand name Jarrett? A. No, I didn't.

Q. Did you hear of any such set of inside and outside micrometers being taken from the house? A. I did not.

By Mr. McAuley:

Q. To your knowledge how many police officers, including Federal agents and state troopers were in and about that living room between 5 p.m. and 1 a.m. on February 15? A. About 16.

Q. You were not in the living room at all times, were you? A. Not at all times.

Mr. McAuley: All right.
The Court: All right.
Mr. Frank: The Government has no questions.

(Witness excused.)

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Isaac M. Platt, called as a witness on behalf of the defendant Juliano, being first sworn, testified as follows:

Direct Examination by Mr. McAuley:

Q. Commissioner, I understand that you have in your personal diary of your official record a copy of the return that was made in this case? A. I have.

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Q. May I see it, please?

The Court: What is that book that you are looking at, Commissioner?

The Witness: It is my Criminal Docket No. 2.

The Court: Have you in your Criminal Docket an entry with respect to a search warrant issued in this matter?

The Witness: I have.

The Court: I suggest that we have photostatic copy of the entries in this docket made and have them marked in evidence. Is there any objection?

Mr. McAuley: No, your Honor.

The Court: All right.

Mr. Frank: I shall do that.

The Court: All right. It will be marked Government's Exhibit 3 at this hearing.

(Marked Government's Exhibt 3.)

Mr. McAuley: May I have a moment, your Honor,

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to look at it?

(Mr. McAuley examines book.)

Q. Commissioner, would you please state in whose handwriting this single sheet of paper is? A. Mine.

Q. That is in your handwriting? A. That is my handwriting.

Q. Before you wrote that did you take it from another paper? A. I copied it from a return of the search warrant.

Q. And that was the original, is that correct? A. That is correct.

Q. And that original, as I understand it, is not available? A. Apparently not.

Q. Will you tell us your best recollection as to when for the last time you saw that original search warrant and the original attested return? A. I couldn't tell you when. There had been four, at least four to my knowledge, members of the United States Attorney's office who were on this case. To the best of my recollection I turned that original over to some one of the men who were on this case.

Q. Am I correct that it does not appear from this paper, the paper which you have described as a list of the returns in your official Criminal Docket book, there does not ap-

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pear any date of any return? A. I think it does.

Q. I mean on the paper itself. A. Not on that but where the return is made on the 23rd.

By the Court:

Q. Commissioner, the rules provide that returns on the issuance of a search warrant shall be made by you and filed by you? A. Yes, sir.

Q. For the Clerk of the Court? A. That's right.

Q. The Clerk advises me that the return was never filed with the Clerk of the Court. A. That's right.

Q. And that you turned it over to one of the United States Attorney's assistants to be filed in the Clerk's Office? A. That's right.

Q. You have no clerical staff available to send down here on errands of that nature? A. No; the Government

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provides no expense for anything like that. I have to pay for it myself.

The Court: So that the rules may be complied with, will you prepare a certificate of the entries as made by you, a copy of the affidavit and a copy of the returns as filed by you or as filed with you and given to Mr. Frank, and Mr. Frank is instructed to apply to me for an order permitting that to be filed nunc pro tunc.

By the Court:

Q. Mr. Platt, there is one more question: Was any de-

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mand ever made upon you or before you for the return of any of the property which was seized under this search warrant? A. Never.

Q. No application was made to you? A. Never, at no time, never.

Q. Did anybody come to you and ask you for a copy of the inventory? A. Never did.

By Mr. McAuley:

Q. Can you recall the name of the assistant United States attorney to whom you, as I understand you, personally handed this or did you give it to an agent? A. I know that Mr. Clark and Mr. Leone and Fred—

Q. Fred Block? A. —Fred Block and Mr. Leone and Mr. Frank have been on this case. It was some time ago. I wouldn't want to say—as the Judge said, I should have filed it.

Q. That is not the question. A. I don't want to
any blame on anybody.

Q. I am not questioning that point, Commissioner; I
merely asking you if you can recall the agent or
assistant United States attorney to whom, as I und
stand you, you gave physically this warrant with
attested return. A. I can't.

By the Court:

Q. Have you seen this copy of the search warrant and
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copy of the affidavit which have been marked in eviden
as Government's Exhibits 1 and 2 on this hearing? A.
is marked as a true copy. It was done at the time.

Q. Are these exhibits which are now in evidence as Go
ernment's Exhibits 1 and 2 at this hearing true and
curate copies of the affidavits submitted to you and
warrants issued by you? A. They are, your Honor. I
certified them at the time they were made.

Q. You certified them at the time? A. Yes, sir.

Q. And have you in your records or register a co
of the returns as filed by you? A. I have the copies
the inventory.

Q. So that you are in a position to prepare a duplica
set of papers to replace the ones which have been mi
placed? A. Yes, sir.

The Court: Are there any more questions, M
McAuley?

Motion to Suppress

Isaac **M. Platt**—*for Defendant Juliano—Direct*

By Mr. McAuley:

Q. Am I correct, for the record, that there is no attestation on this paper to which you refer as the copy of the return? A. That's right, it is my record, that's all.

Q. I show you this paper headed Seizure, February 15, 1950. Has this piece of paper been unavailable at all times until very recently, Commissioner? A. What?

Q. Has it been unavailable?

The Court: What do you mean by "unavailable"?

The Witness: It has been right there.

Q. It has been in your records? A. Right straight there, yes.

The Court: Has Mr. McAuley been up to look at it at all?

The Witness: No, nobody has looked at it.

Q. Am I correct that of those 17 or thereabouts, or approximately 17 entries that are made on that return that there is no return for any papers of any kind or character or description?

The Court: The paper speaks for itself; objection sustained.

Q. Irrespective of whether the entries appear on that record, were any private papers given to you, Commissioner, by the agents at the time the return was made? A. No.

Mr. Frank: I object to that.

The Court: He says no. Whether it was private papers is a matter of opinion.

Mr. McAuley: That is all, Commissioner.

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The Court: All right. No cross-examination?

Mr. Frank: No cross-examination.

(Witness excused.)

Mr. Frank: May I ask the Court's indulgence for just a moment?

I have a witness who is a public official and who has come down from up-State, and especially in view of the fact that we are going to adjourn at 12 o'clock may I ask permission to put him on the stand as soon as he gets here?

The Court: Very well, although I don't know what he is going to testify to.

Mr. Frank: Mr. Davis.

LESTER DAVIS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Frank:

Q. What is your occupation? A. Justice of the Peace.

Q. You are a Justice of the Peace? A. That's right.

Q. In March of 1948 were you acting in that capacity? A. Yes.

The Court: You were a Justice of the Peace in March 1948?

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The Witness: Yes.

Q. Do you know one Joseph C. Juliano? A. Yes.

Q. Did you see him in March of 1948? A. Yes, sir.

Q. Did he give you anything in March of 1948? A. He turned over a revolver to me to hand over to a New York State Trooper.

Q. What kind of revolver was it, do you know? A. No, I couldn't say.

Mr. Frank: No further questions.

Mr. McAuley: This was in 1948?

Mr. Frank: 1948.

The Court: Any cross-examination?

Mr. McAuley: No.

The Court: I am surprised, Mr. McAuley. The intimation from your affidavit is that these agents—

Mr. McAuley: This is two years before.

The Court: The purpose of this is to show that the gun was not even in existence.

Mr. McAuley: I don't know which gun was turned over to this man.

The Court: I don't either. You can't buy a gun in New York without a license.

Mr. McAuley: With a permit, yes.

The Court: And the permit bears the number of the gun, doesn't it?

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Mr. Frank: I will tie that up.

Mr. McAuley: I don't know which gun it is.

The Court: Your affidavit would give me the impression that when these agents descended upon the farm that they acted like Ali Baba and the Forty Thieves, and that they picked up anything that was worth anything and appropriated it to their own use.

All right, any other questions?

Mr. McAuley: No questions.

The Court: That is all.

(Witness excused.)

The Court: What else have you?

Mr. Frank: I can put on one more witness.

The Court: All right, put him.

RAYMOND J. DUNN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Frank:

Q. Your name is Raymond J. Dunn? A. Yes, sir.

Q. You are a State Trooper, is that right? A. Yes, sir.

Q. In March of 1948 did you have occasion to receive a gun from Judge Davis? A. Yes, sir, I did.

Q. What kind of a gun was that? A. A .38 Smith & Wesson.

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Motion to Suppress

Raymond J. Dunn—for Government—Cross

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Q. Now would you please state the circumstances under which you received that gun? A. On February 20, 1948, I received a communication from the Police Department of the City of New York stating that the 1947 pistol permit for Joseph Juliano had expired, that he had not renewed it, and to pick up his application and the old permit and the gun and turn them over to the New York City Police Department.

Q. And what did you do with the gun after you received it? A. I turned it over to the New York City Police Department.

Mr. Frank: All right, that is all.

Cross Examination by Mr. McAuley:

Q. Officer Dunn, was it a .38, as you say? A. Yes, sir.

Q. Or a .32? A. .38.

Q. Do you have any knowledge as to whether or not subsequent to that date in 1948 Mr. Juliano applied for and received a permit for a .32 Smith & Wesson revolver? A. No, sir, I haven't.

Q. Do you have a recollection in January or thereabouts in 1950, Officer Dunn, of being present with some local judge on the Juliano farm in the presence of Mr. Juliano? A. No, sir.

Q. Do you have any recollection of making any inquiry

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with Judge Davis about whether or not the Juliano premises were for sale or rent at that time? A. No, sir.

Q. Do you have any recollection of your car or the Judge's

car being caught in any type of snow bank or rut and of Mr. Juliano assisting you— A. Yes, sir.

Q. You do have a recollection of that? A. Yes, sir.

Q. Can you state if your recollection is refreshed the conversation—

The Court: What has that got to do with this pistol and the validity of the execution of the search warrant?

Mr. McAuley: It is not, strictly speaking, your Honor.

The Court: Let us drop it. All right, you are excused, Officer. Thank you.

(Witness excused.)

The Court: Do you have any more witnesses?

Mr. McAuley: Yes, sir.

The Court: How many?

Mr. McAuley: One.

The Court: All right, put him on.

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FRANK LANGO, called as a witness on behalf of the defendant Juliano, being first duly sworn, testified as follows:

Direct Examination by Mr. McAuley:

Q. Mr. Lango, you are the Frank Lango who is mentioned as a defendant in Indictment C. 135-100? A. Yes, sir.

Q. And you have pleaded guilty to the charge in the indictment, is that correct? A. That is right.

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Q. Are you here today after having been examined by me and at my request to testify? A. That's right.

Q. And do you do so with the full knowledge that on Friday of this week you are to be sentenced by the Court now presiding? A. Yes, sir.

Q. In connection with this case? A. Yes, sir.

Q. You do that with the full knowledge that you are to be sentenced by this Court? A. Yes, sir.

Q. Now, are you the person who was with Cutugno and you were arrested at 5 or 5.30 on February 15, 1950, and after your apprehension taken into a living room at the dwelling house on the Juliano farm? A. Yes, sir, I am.

Q. Would you tell us approximately what time it was when you were taken into the living room? A. About 5.30, February 15, 5.30 in the evening.

Q. Who was with you in the living room? A. Well,

there was about ten agents then.

Q. Anybody else? A. And about three State Troopers.

Q. Three State Troopers? A. That's right.

Q. Anybody else? A. One other fellow, Joseph Cutugno who was arrested with me.

Q. Do you remember whether you remained within the four walls of that house until approximately 12.30 or 1.00 a. m.? A. Yes, we were handcuffed on the couch in the living room.

By the Court:

Q. Were you operating that still up there with Cutugno? A. Yes, sir.

Q. How long had you been operating it? A. About three weeks.

Q. Who hired you to operate it? A. Some friend I met while drinking at a bar.

Q. What is his name? A. Jim.

Q. Jim what? A. That's the only name he gave me.

Q. Where does he live? A. He never gave me his address.

Q. Have you ever seen him since? A. No, I haven't.

Q. What bar was it? A. What bar did I meet him?

Q. Yes. A. It is known by the name of Adelaide's.

Q. Where is Adelaide's Bar? A. On 44th Street and Broadway, I believe.

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Q. Aren't you sure? A. No, sir, I am not.

Q. You are not sure of the location of the bar where you met him? A. No, sir.

Q. Who introduced you? A. Nobody; we just got to talking.

Q. You were an absolute stranger to him? A. That's right.

Q. And he hired you to run the still? A. No, sir; he offered me a job.

Q. You knew that it was to run a still, didn't you? A. He told me afterward, yes, sir.

Q. You went to work for him even though you didn't know him? A. Yes, sir.

Q. You don't know his last name? A. No, sir.

Q. You don't know where he lives? A. That's right, sir.

The Court: All right.

Q. Have you ever been convicted of any crime before this? A. No, sir.

The Court: Go ahead, Mr. McAuley.

By Mr. McAuley:

Q. When you entered the living room will you tell us what furnishings if any were in the living room, and will you please use this courtroom as an outline, a rough outline for the location. A. There was a main entrance door

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over here on this side and on this side there was a couch and a couch on this side, and a pot-bellied stove, and in the corner was a desk, and on the side of the desk there was a floor lamp, and on the side of the floor lamp there was a radio, and on this corner there was a stairway leading to the upstairs rooms.

Q. You said that you were brought into the room and that you were handcuffed to the couch. A. Yes, sir.

Q. Was anybody else seated on the couch with you? A. Mr. Joseph Cutugno.

Q. Was the other couch opposite you or diagonally across from you? A. Pardon?

Q. Where was the other couch? A. It was to my right.

Q. When you entered that room was there anybody else sitting on that couch? A. No, sir.

Q. Was there any object on that couch? A. No, sir.

Q. I am going to direct your attention to approximately the first two hours that you were in that room about 5.30 to 7.30. During that time were you questioned by any of the investigating agents? A. No, sir, I wasn't.

Q. Were you questioned at any time from 5 p. m. until 1 a. m.? A. No, sir.

Q. By even one agent? A. No, sir.

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Q. What did you do? A. Just sat there.

Q. What did Cutugno do? A. Just sat there too.

Q. At any time between 5 p.m. and 1 a.m. did you leave or were you taken from the living room to any other part of the dwelling house? A. No, sir.

Q. What? A. No, sir.

Q. Are you sure of that? A. Positive.

Q. Were you taken out into the kitchen for food or coffee? A. No, sir.

Q. Were you offered food or coffee? A. No, sir.

The Court: This man has pleaded guilty, has he not?

Mr. McAuley: But I am calling him as a witness.

The Court: What has that got to do with this proceeding here now, whether he was fed or was not fed?

Mr. McAuley: I am offering him as affecting the credibility of the witnesses who testified in this case, your Honor.

The Court: Is that the only purpose that you are offering this witness for?

Mr. McAuley: I am offering him as proof of the events that went on in the living room especially with reference to the desk.

The Court: Ask him about it then, because if you are offering him simply to impeach the credibility of

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the other witnesses, I do not believe this man's testi-

mony. He has impressed me as being entirely untruthful and unreliable. I would not believe him on a stack of Bibles.

Q. Now, Mr. Lango, when you entered the living room and after you were seated on the davenport did you observe the desk in the room? A. Yes, sir.

Q. To the best of your ability will you describe that desk? A. It was one of these old type—I don't know what you call them—roll top desks.

Q. Did it have a keyhole? A. Yes, sir, it did.

Q. Where on the desk was the keyhole? A. At the bottom of the drawer.

Q. When you entered that room was that desk open or shut? A. It was shut.

Q. It was closed? A. That's right.

Q. Could you see any papers visible? A. No, sir.

Q. On that desk? A. No, sir, I couldn't.

Q. Were there any holes in the coverings of the desk in which you could see? A. No, sir.

Q. Thereafter did you see any agents approach that desk? A. Pardon?

Q. Thereafter, that is after you went into the living room and were seated on the couch, did you see anyone approach that desk or go toward the desk? A. At about

9 o'clock I did.

Q. What happened? A. Well, a few of the agents came in from the barn and one of the agents made a remark that, if the desk was open, and nobody answered it, and

he tried it, and so it was closed, and then he started to pry it open with some kind of an instrument.

Q. Did you see the instrument? A. No, sir, I didn't.

By the Court:

Q. How far away from the desk were you? A. I would say about 8 feet.

Q. What part of the desk did they pry open? A. The center, the door where the lock was.

Q. What door? A. The door on it.

Q. Where was the door located? A. It was one of these old type desks.

Q. Where was the door located? A. Right on top of the desk.

Q. Inside of the desk? A. No, sir, on the outside.

Q. Was it below the desk part? A. The lock was on the ledge of the desk, where the door meets the ledge of the desk.

Q. What color was this desk? A. I believe it was sort of a maple finish.

Q. Do you know whether it was a maple finish? A. No, I am not positive.

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Q. Do you know whether it was a mahogany desk? A. No, sir.

Q. Or red in color? A. No.

Q. What? A. No.

Q. You are not sure whether it was maple in color, are you? A. No, sir.

Q. You say that it was a roll top desk. Are you sure of that? A. Positive.

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Q. Was it a desk that opened up on a ledge? A. No, sir.

Q. With a long shelf? A. No, sir.

Q. You are sure of that? A. Positive.

Q. Did you have the key to that desk? A. No, sir, I did not.

Q. Did you have any papers in that desk? A. No, sir.

Q. Did you see a coat there or a jacket? A. No, sir, I did not.

Q. Did you see a coat or a jacket around at any time? A. No, I did not.

Q. An olive drab Navy jacket? A. No, sir.

The Court: Go ahead.

By Mr. McAuley:

Q. What part of the investigator that you say approached the desk, what part of his anatomy was toward you where you sat? A. His side.

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Q. After a period of time when you saw him at the desk what happened? A. Well, when he got the door pried open it flew up, and he went through the papers there.

Q. You used the word "door." Are you familiar with a door in a china closet or a kitchen closet? A. Yes, sir.

Q. Do you use the word "door" in that sense? A. No, sir.

Q. What do you mean by a door? A. This folding door that was on the desk.

Q. You call it a folding door? A. Yes.

Q. All right, and then what happened? A. He was joined by another agent and just went through the papers.

Q. Do you know the names of these two agents whom you saw at the desk? A. I know the name of one of them.

Q. What is his name? A. One is Mr. King and the other one is the Major.

Q. Major Lane? A. Yes.

Q. At any time during the evening did Mr. King identify himself to you in any particular respect? A. Yes, sir.

Q. What did he say? A. It was about 11 o'clock at night and he told us that our fingerprints and our pictures were to be taken, and he told us, "I am Mr. King and I am in

charge of this detail."

Q. How long in all did you see Investigators Lane and King at the desk after it was opened or pried open? A. About twenty minutes or so.

Q. During those twenty minutes that you saw them do anything what were they doing? A. Just looking through the papers.

Q. Will you indicate in what manner they looked through the papers? A. They were just picking them up, reading them and putting them down.

Q. Where were the papers before they had picked them up? A. That I couldn't see too good.

Mr. Frank: If your Honor please, I object to that.

The Court: Objection overruled.

You did not see where the papers were before they picked them up?

The Witness: No, sir.

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Q. Could you describe the appearance of the interior of the desk? Did you see the interior of the desk at any time? A. I seen it, yes.

Q. What did it look like? A. It was just one of these pigeon-hole types.

Q. Do you know whether or not the papers that you observed were in the pigeon-holes at any time while you were

looking at it? A. No, I couldn't see.

Q. After this 20 minutes or thereabouts was over what happened, what did the agents do, if you know, with respect to the papers? A. No, sir, I don't know.

Q. At any time within the first hour after you entered the room or after that first hour did you see Agent Lane pick up any jacket, a khaki or olive drab jacket, lined with alpaca, which was lying on the davenport, either the one you were sitting on or the one opposite?

Mr. Frank: I object to the question as to form.

The Court: Objection overruled. Let him answer.

A. No, I did not.

Q. You did not? A. No.

Q. Referring to that same evening and to the same time, approximately 5.30 or 6.00 p. m. on February 15, 1950, was there any object located at or about or under the desk that you are telling us about? A. Yes, sir, there was.

Q. What was the object? A. There was a power saw.

Q. Will you describe the appearance of that power saw or the case in which it was contained? A. I know that it was a power saw; that's about all.

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Q. Was it contained in a container? A. Yes, sir, it was in a container.

Q. What was the appearance of the container? A. It was a brown case.

Q. Made of what? A. I couldn't say what it was made of.

Q. Was it wood or metal if you know? A. I think it was wood.

Q. Was the case covered over by any cloth or anything under the desk? A. I couldn't say.

Q. You did see it easily or did you have to make an effort to see it? A. Well, I knew it was there.

Q. And did you see it there that night? A. Yes, sir.

Q. Did there come a time that evening when that power saw was removed by someone from under the desk to some other place? A. I couldn't say that it was or not.

Q. You couldn't say whether or not it was taken? A. Yes.

Q. Did you see anybody take anything from the desk other than papers? A. No, sir.

Q. Were you at any time that evening questioned about papers? A. No, sir.

By the Court:

Q. Did you see this book in which items of food pur-

—940—

chases were entered? A. No, sir, I didn't.

Q. Who purchased the food that you and Cutugno had while you were up there operating the still? A. It was brought up by the truck driver.

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Q. Did Juliano ever go out and buy any food for you? A. No, sir.

Q. Who put the telephone in from the house to the barn? Who installed that? A. I did.

Q. Did anybody help you? A. No, sir.

Q. What part did you take in the operation of the still? A. I was melting sugar.

Q. You were what? A. Melting sugar.

The Court: Any other questions?

Mr. McAuley: I do not have any further questions.

The Court: Do you have any cross-examination?

Mr. Frank: I would like to cross-examine briefly, if your Honor please.

Cross Examination by Mr. Frank:

Q. Mr. Lango, you never knew Joseph Juliano, did you? A. No, sir, I didn't.

Q. While you were up at the farm did you see the Rogers plate silver? A. No, I didn't.

Q. You saw a .32 Smith & Wesson revolver, did you? A. No, sir.

By the Court:

Q. You say that you never met Juliano? A. He says prior to the time—

Q. While you were up there. A. Oh, yes, sir, while I was up there, yes, sir.

Q. Juliano stayed overnight, didn't he? A. Twice.

Motion to Suppress

Frank Lango—for Defendant Juliano—Cross

By Mr. Frank:

Q. What date did he stay overnight on? A. I don't remember the dates. One time was in January, I believe the last week in January, and I believe some time in February.

Q. Did you ever pay Mr. Juliano rent? A. No, I never paid Mr. Juliano rent.

Q. Did you ever see anybody pay him rent? A. No, sir.

Q. Do you know Joseph Bosco? A. Yes.

Q. Do you know Vito Giallo? A. No.

By the Court:

Q. How long have you known Bosco? A. Only since the time he was arrested.

Q. That is the only time you ever saw him up there? A. Yes, sir.

Q. Did you ever see him at any other place? A. Only when he was brought here.

Q. Prior to February 15, 1950, you did not know Bosco? A. No, sir.

Q. And you never met Giallo? A. No, sir.

Q. You never met Valenti? A. No, sir.

By Mr. Frank:

Q. In other words, none of these defendants in this case ever bought or ever came up to this still except Bosco at the time you were arrested?

Mr. McAuley: I am going to object to this line as not being proper cross-examination and immaterial on the motion.

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Motion to Suppress

Frank Lango—for Defendant Juliano—Cross

The Court: It inquires into this man's probity, but really I think it is a waste of time because I am not impressed at all by his testimony. I feel that he is committing perjury here, as far as I am concerned.

Mr. McAuley: He is a very brave man indeed if he will do that.

The Court: What do you mean? I don't like your remarks, Mr. McAuley. Sit down. I think you are impertinent. You as a former assistant United States attorney ought to be a little more careful in your selection of words.

Have you any more questions of this man?

Mr. Frank: Just one more question, if your Honor please.

Q. You say that you do not recall what color the desk was, is that right? A. That's right.

Q. Yet you recall perfectly what color the box underneath

—943—

the desk was, don't you? A. I say brown; I am guessing.

Mr. Frank: No further questions.

The Court: All right. Sit down over there. Sit down over there, Mr. Lango.

(Witness complies.)

The Court: Is there any other testimony that you have to produce?

Mr. McAuley: No, your Honor.

The Court: Does the Government rest?

Mr. Frank: The Government rests.

The Court: The motion to compel the return of this property and to suppress as evidence is denied on the merits.

* * * * *

Government's Exhibit 1

UNITED STATES DISTRICT COURT

for the

Southern District of New York

UNITED STATES OF AMERICA

v

A two story frame house and a two story red frame barn located on the Joseph Juliano premises on a road leading northerly off Maltby Hollow Road, near West Shokan, Town of Olive County of Ulster, State and Southern District of New York.

SEARCH WARRANT

To Vincent P. King, Harry O. Perkins, James L. Curran, Benjamin L. Lane, Paul V. Slaninger, Investigators of the Alcohol Tax Unit and Civil Officers of the United States.

Affidavit having been made before me by Harry O. Perkins and Benjamin L. Lane that they have reason to believe that on the premises known as A two story frame barn, painted red, about fifty feet wide by sixty feet long also a two story frame house painted white, about thirty feet wide and thirty six feet long. Located on the Joseph Juliano premises near the village of West Shokan, New York, in the Town of Olive, County of Ulster, State of New York. Said premises being located on a road leading off to the right in a northerly direction from the Maltby

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Government's Exhibit 1

Hollow Road at a point near the premises known as "Manitou Lodge"; said premises being located at a point approximately one-fourth mile from said Maltby Hollow Road and being the first premises on the right side of said road entrance thereto by crossing a small wooden bridge, in the Southern District of New York, there is now being concealed certain property, namely an unregistered still, distilling equipment and paraphernalia used in connection therewith, fermenting mash and distilled spirits, which are being used for the purpose of operating an unregistered distillery in violation of Sections 2803a, 2806f, 2833a, and 2834 of the Internal Revenue Code and I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exists.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 14 day of February, 1950.

Isaac Platt
(Sgd) ISAAC PLATT
U.S. Commissioner.

A TRUE COPY
Isaac Platt
(Sgd) ISAAC PLATT
UNITED STATES COMMISSIONER

Government's Exhibit 2

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—v—

A two story frame house and a two story red frame barn located on the Joseph Juliano premises on a road leading northerly off Maltby Hollow Road, near West Shokan, Town of Olive, County of Ulster, State of New York.
Southern District of New York,

AFFIDAVIT FOR SEARCH WARRANT

BEFORE Isaac Platt, Poughkeepsie, New York

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as a two story frame barn, painted red, about fifty feet wide by sixty feet long also a two story frame house painted white, about thirty feet wide and thirty six feet long. Located on the Joseph Juliano Premises near the village of West Shokan, New York, in the Town of Olive, County of Ulster, State of New York. Said premises being located on a road leading off to the right in a northerly direction from the Maltby Hollow Road at a point near the premises known as "Manitou Lodge", said premises being located at a point approximately one-fourth mile

from said Maltby Hollow Road and being the first premises on the right side of said road entrance thereto by crossing a small wooden bridge, in the Southern District of New York, there is now being concealed certain property, namely an unregistered still, distilling equipment and paraphernalia used in connection therewith, fermenting mash and distilled spirits, which are being used for the purpose operating an unregistered distillery in violations of Sections 2803a, 2806f, 2833a, and 2834 of the Internal Revenue Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Affiants state that on Jan. 5, 1950 they received official notification from the office of the Investigator in Charge of the Alcohol Tax Unit, New York City, N.Y. that a dark Green Truck bearing a sign on the side of the body reading "A. CALLIANO & SONS, 644 Greenwich Street, New York City, N.Y. was transporting sugar to the vicinity of Boiceville, New York.

On February 1, 1950 affiant Harry O. Perkins saw the above truck bearing New York 1950 series license plates 130-622, heavily loaded, coming from Boiceville, New York on New York State Route 28 A turn right at the West Shokan, New York Post Office and proceed in a northerly direction up this road.

On February 11, 1950 affiants again received official notification that the same aforesaid truck had picked up a load of sugar in New York City, New York.

On February 12, 1950 affiants observed the aforesaid truck proceeding north on New York State Route 9W at

Government's Exhibit 2

Highland, N.Y. The body of the truck was riding low on the chasis springs and appeared to be very heavily loaded. At about 6.50 P.M. they saw this truck enter the Joseph Juliano premises about one mile west of West Shokan, New York. At this time the truck bore New York State 1950 series license plates 138-230.

On February 13, 1950 affiant Benjamin L. Lane between the hours of 8 P.M. and 10 P.M. observed the farmhouse and the large two story red frame barn on the Joseph Juliano premises. He smelled strong odors of fermenting and cooking mash emanating from the vicinity of the large red barn, heard the sound of pumps working, the rattling of metallic objects and sounds of male voices in and about the large red barn. He also saw a man go from the barn into the farmhouse and later saw a man come from the house and enter the barn.

Affiants say that they have been in the service of the United States Government for more than fifteen years, their activities being in the Alcohol Tax Unit and predecessor unit, and based on their experience they believe that an illicit distillery is being operated on the said premises.

Benjamin L. Lane
s/ BENJAMIN L. LANE
Signature of Affiant

Harry O. Perkins
s/ HARRY O. PERKINS
Signature of Affiant

Investigators, Alcohol Tax Unit

Government's Exhibit 2

A TRUE COPY

Isaac Platt
s/ ISAAC PLATT
United States Commissioner

Sworn to before me, and subscribed in my presence, February 14th, 1950.

Isaac Platt
s/ ISAAC PLATT
United States Commissioner.

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1. The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

Seizure Feb. 15, 1950

1—continuous rum type still
1—steel offset sections 30″ x 24″
1—steel section 30″ x 24″
6—sections copper column 30″ x 36″
1—copper dephligator 40″ x 61″
1—galvanized iron condenser with copper boiler 475 gals. capacity
1—High pressure steam boiler 54′ x 14½′ with electric motor and oil burner attached
1—275 gal steel water supply tank
1—200 gal galvanized iron heater

Government's Exhibit 2

1—200 gal wood mixing tank
1—4700 gal wood mash vat ½ full
2—4700 gal " " vats full
1—8262 " " " " "
1—400 " copper receiving tank
with 50 gals. alcohol
60—5 gal. cans
60—5 " " empty
1—Electric motor centrifugal
1—Pump, no name.

(Signed) HOPERKINS, *Investigator*

[fol. 247] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1952

No. 258

Argued May 15, 1953 Decided August 20, 1953

Docket No. 22675

UNITED STATES OF AMERICA, Appellee,

against

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO, Appellants

Before: Chase, Clark and Frank Circuit Judges

Appeal from a judgment of the District Court for the Southern District of New York. Ryan, Judge. Affirmed

Henry K. Chapman, Attorney for Appellants, Giallo and Valenti;

Harold J. McAuley, Attorney for Appellant, Juliano.

J. Edward Lumbard, United States Attorney, Southern District of New York, Attorney for Appellee; Thomas F. Burchill, Jr., Harold J. Raby, Assistant United States Attorneys, of Counsel.

[fol. 248] CHASE, Circuit Judge:

The three appellants were convicted after a trial by jury on an indictment charging them with having conspired, contrary to Title 18 U. S. C. § 371, to violate several sections of Title 26 U. S. C. More particularly, the first count, on which they were convicted, charged them with having conspired to operate a distillery, to manufacture distilled spirits without giving bond and to transport distilled spirits in non-taxpaid containers.[1]

[1] The indictment was in two counts, the second charging the appellant Juliano and others not parties to this appeal with violation of Title 26 U. S. C. § 2810 by having custody and control of a still set up that was not registered as required by law. The jury disagreed as to Juliano's guilt on this count.

Since the sufficiency of the evidence against the appellants is not questioned, the facts shown at the trial need be related only briefly. Treasury agents testified that they observed that appellants Giallo and Valenti had for a considerable time been sending quantities of sugar periodically from New York City to the vicinity of Kingston, N. Y., in a green-colored truck. The destination of the truck was finally traced to a farm in that vicinity owned by appellant Juliano; and, on February 15, 1950, having obtained a valid search warrant, the agents searched those premises. They discovered a still set up and operating with the usual appurtenances for the distillation of spirits and arrested men working there, none of whom were the appellants. They also seized the green truck above mentioned as it was approaching the farm. Since nothing turns upon the nature of the evidence of Giallo's and Valenti's participation in the conspiracy, no outline of that is necessary.

Appellant Juliano, the owner of the farm, testified that he had been a carpenter and garage mechanic prior to buying the farm in 1946. From that year until September [fol. 249] 1949 he lived with his wife and three children at the farm and tried to operate it; but that venture turned out unsuccessfully and he left for West Berlin, N. Y., to live in the home of a brother-in-law, leaving his tools and some other personal property at the farm. Juliano found work and went back to his farm in December 1949 to get some of his tools. He testified that while there he met a man he didn't know but who identified himself by handing him a card with "Giallanno Trucking" printed on it. The stranger said that he was in the trucking business in Kingston and, needing storage space for trucks and his car, inquired whether he could rent the house and barn. Without learning more about the man, Juliano rented the buildings to him for $65.00 a month and received payment for a month's rent.

After that Juliano returned to the farm a few times to get more tools. He testified that he was on the way there on February 15, 1950, but neighbors nearby told him not to go to the farm because there was "trouble up there."

They told him there were state troopers, federal investigators and "the biggest distillery you ever saw"; whereupon he became "panicky" and went instead to his home in West Berlin, about one hundred miles distant.

The appellants refer to various instances during the trial when the judge participated in the examination of witnesses, and they claim they add up to reversible error. We do not find it necessary to discuss those instances in detail. The record does show that the judge took an active part in the examination of witnesses which seems to have been more extensive and less even tempered than is to be commended. But we do not find here a situation comparable to that which required reversal in *United States* v. *Marzano*, 2 Cir., 149 F. 2d 923. And see *Billeci* v. *United States*, D. C. Cir., 184 F. 2d 394. Here discretion was exercised within permissible bounds, as shown by such cases [fol. 250] as *United States* v. *Aaron*, 2 Cir., 190 F. 2d 144, and *Simon* v. *United States*, 4 Cir., 123 F. 2d 80.

There were two instances in which a Treasury agent, as a Government witness, gave unresponsive answers on cross-examination; and appellants Valenti and Giallo claim that the gratuitous observations injected into those answers were so prejudicial that it was erroneous for the court to deny a motion for a mistrial.

The first instance was a statement by the witness that he thought Valenti might have known him prior to his arrest. Valenti claims that it was prejudicial for the jury to know that he knew an agent of the Alcohol Tax Unit; but since the court on motion struck the statement, it does not seem at all important.

The second instance involved a question about a conversation between the witness and Giallo, and the relavant portion of the record is quoted in the margin.[2] The

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[2] Q. And when you seized the Plymouth black sedan from Mr. Giallo, he told you, to all your questions, directly that he didn't know anything about it and had never been to West Shokan, is that right? A. That is right. I also told

[fol. 251] witness, not in response to the question, said, "I also told him the reason I wasn't arresting him was because he was out on bail——." The reference was to bail for an offense other than the one specified in the indictment. The

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him the reason I wasn't arresting him was because he was out on bail——

Mr. Chapman: I am going to move for a mistrial if we have any more of the voluntary statements, your Honor.

The Court: Mr. Chapman, don't address the Court in that way.

Mr. Chapman: No. I, naturally——

The Court: Don't address the Court in that way.

Mr. Chapman: I wasn't addressing your Honor in any way, but you can understand my rancor.

The Court: Mr. Ginanatasio——

The Witness: Yes, sir?

The Court: —don't make any statements of that nature again.

Stricken from the record and the jury are instructed to disregard them and erase them from their minds.

Go ahead. Next question.

Mr. Chapman: I think, for the record, I ought to move for a mistrial because the witness has twice volunteered statements not responsive to any questions, and serving to prejudice my client.

The Court: I don't regard that as prejudicial.

Mr. Chapman: Your Honor will overrule it?

The Court: The jury will erase anything from their minds that I have stricken from the record.

Mr. Chapman: That is a very, sometimes, a very hard thing to do.

The Court: We will ask the jurors now.

Do any of you feel that you cannot erase that from your mind, or any of you feel that that remark which I have ordered stricken from the record would prejudice you in any way in the fair consideration of the guilt or innocence of any of these defendants.

The jury have all indicated in the negative. Your motion is denied.

Mr. Chapman: Exception.

judge instructed the jury to disregard the statement, but he denied a motion for a mistrial. We do not find error in that ruling. At most the witness' statement tended to show that Giallo had been under arrest, and the jury might well have supposed that the arrest was on the indictment on which he was being tried. But his own attorney increased any likelihood of harm by making it appear of record that he was not arrested on that indictment until March 29, 1951, and in this way made it known to the jury that he had been accused of some offense other than that for which he was being tried. However, that may be, we think the judge was well within the bounds of sound discretion in denying the motion for a mistrial after having instructed the jury to disregard the statement volunteered by the witness. *United States* v. *Kushner*, 2 Cir., 135 F. 2d 668; cert. denied 320 U. S. 212; *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928; *United States* v. *Curzio*, 3 Cir., 179 F. 2d 380.

When the farm was searched on February 15, 1950, the agents found in the house a coat belonging to Juliano; and in one of the coat pockets there were invoices representing the purchase by Juliano of a septic tank, plumbing pipe, nipples and a refrigerator fan belt, all items which could be used in connection with the operation of a still. [fol. 252] In a desk belonging to Juliano there was a scrap of paper containing the name of a person who was named in the indictment as a co-defendant. The invoices and the piece of paper were admitted as Government exhibits, and the appellant Juliano urges that such admission was error. But the invoices and paper were admissible as part of what was discovered on the premises, its weight, if any, as evidence of Juliano's participation in the conspiracy being for the jury. The fact that the government did not show that any of the materials described in the invoices were actually used in connection with the still did not affect their admissibility but only went to their weight as evidence.

After the trial had started, counsel for appellant Juliano moved to suppress the evidence obtained in the search, and he sought to excuse his failure to take such action prior to trial by showing that failure to file the search warrant and the affidavit of the Treasury agents on which

it was granted had prevented earlier action. See Federal Rule of Criminal Procedure, 41 (e). Neither the affidavit nor the search warrant could be found during the trial, but a Treasury agent named Lane, who with another had executed the affidavit, testified as to what it contained; and the motion to suppress was denied. After the trial, however, copies of the warrant and supporting affidavit were found, and they were produced at a hearing at which it was found that they provided no substantial basis for the motion to suppress.

The failure to grant that motion is not claimed to have been an error. But it is claimed that there are discrepancies between Lane's statements at the trial and those he made in the affidavit, and that the failure to have the affidavit available at the trial deprived the appellant Juliano of his right to cross-examine. On this ground it is urged [fol. 253] that the judge was in error in denying a motion for a new trial.

Lane testified at the trial that late in the afternoon of February 11, 1950 he saw the green-colored truck, already mentioned backed up to the barn on the Juliano farm and that he heard "thuds" and men talking and saw a large spotlight on the house which went on intermittently while he was making his observations. It was in this way that the agents found out that the truck was being used to carry sugar to the farm. Lane also testified that it was his best recollection that what he then testified he had observed was set forth in the affidavit he executed in support of the application for the search warrant.

In the affidavit it was stated that on February 11, 1950 the agents "received official notification" that the truck had picked up a load of sugar in New York City and that on the next day they watched it, apparently heavily loaded, going north on the highway at Highland, N. Y., and at about 6:50 P. M. saw it enter "the Joseph Juliano premises." The affidavit read further: "On February 13, 1950 affiant Benjamin L. Lane between the hours of 8 P. M. and 10 P. M. observed the farmhouse and the large two story red frame barn on the Joseph Juliano premises. He smelled strong odors of fermenting and cooking mash emanating from the vicinity of the large red barn, heard

the sound of pumps working, the rattling of metallic objects and sounds of male voices in and about the large red barn. He also saw a man go from the barn into the farm house and later saw a man come from the house and enter the barn."

We agree with the trial judge that the unavailability of the affidavit at the trial was no basis for granting the motion for a new trial. To be sure, the witness was mistaken in his recollection as to the date of his observations at the Juliano farm according to the affidavit. He identified [fol. 254] the truck on the 12th and made his other observations on the 13th, instead of the 11th, but the exact dates were without significance since all three were before the affidavit was executed. It is unreasonable to suppose that had the affidavit been available for use in his cross-examination the result in this regard would have been more than a correction of his faulty recollection as to the date. That in his testimony he called some of the sounds he heard "thuds" but did not use that word in the description in his affidavit is a discrepancy also trivial.

Judgment affirmed.

FRANK, Circuit Judge (dissenting):

I have great respect for the ability, experience, and integrity of the trial judge. But I think that his participation in this trial far exceeded the limits of judicial discretion. The explanation of this unusual conduct appears pretty clearly in the attempted excuse stated in the government's brief, *i.e.*, the inexperience of the assistant United States attorney who tried the case; as the brief reports, he was "manifestly not a master of the art of cross-examination."

Of course, a federal trial judge is no mere moderator or umpire. He has the duty to ask questions where necessary to elicit truth. And it may have been true in this case that, as the government says, "the questions which were asked by the trial judge were skillfully contrived, and could well have been characterized as effective direct examination, or cross-examination, as the case may be, had they been asked by counsel." That argument, however, ignores this important fact: The judge, on objections by

defendants' counsel. would never have allowed the prosecutor to behave as the judge did here, *i.e.*, to interrupt disruptively by cross-examination, defense counsel's direct examination of witnesses called by the defense. Moreover, [fol. 255] as Judge Shelby remarked more than forty years ago, "A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge."[1] I think it significant that my colleagues make no mention of *U. S.* v. *Brandt*, 196 F. (2d) 653, 655-6 (C. A. 2), where this court recently held that activities of the trial judge, markedly similar to those here, constituted reversible error. There we said that the trial judge must remain "impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. * * * In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled. Beyond this the court actively cross-examined several witnesses, notably the defendant Brandt himself, to a quite unusual extent. This interrupted the orderly presentation of evidence by the defense. But further the questioning appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses."[2] In *Brandt's* case, the government, on the strength of *U. S.* v. *Aaron*, 190 F. (2d)

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[1] *Adler* v. *U. S.*, 182 Fed. 464, 472 (C. A. 5); see also *Hunter* v. *U. S.*, 62 F. (2d) 217, 220 (C. A. 5); *Gomila* v. *U. S.*, 146 F. (2) 372, 373-375 (C. A. 5) (reversed for judicial misconduct despite absence of objection from counsel); *Williams* v. *U. S.*, 93 F. (2d) 685 (C. A. 9); *Frantz* v. *U. S.*, 62 F. (2d) 737, 739 (C. A. 6).

[2] The record here is replete with such interrogation, too extensive for repetition.

144 (C. A. 2), cited here by my colleagues, had argued that the charge had cured these defects. This court replied: [fol. 256] "Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here. For the 900 questions asked by the court during this eight-day trial present far more examples of serious incidents. The cumulative effect of these we are unable to hold cured by the formal charge given." In the case at bar, in six days of trial, the judge asked more than 700 questions, of which some 250 were directed to Juliano, the one defendant who took the stand.[3]

I would be the last person to suggest that a federal trial judge must not tell the jury his belief about the credibility of the witnesses, provided he promptly—not much later—emphatically warns that the jury must reach their own independent conclusion. But when the judge discloses that belief by his manner of questioning a witness, his belief, being implied and not expressed, is seldom coupled with such a warning. No such contemporaneous warnings were given here during the many hours in which the judge griddled witnesses for the defense. Certainly a trial judge may, and often should, ask questions. Particularly should he interrogate a defendant in a criminal case when defense counsel proves incompetent a not infrequent situation when defendants have limited financial resources. But when the judge's questions aid the government, he should be singularly careful lest he appear so partisan as to interfere with the (so-called) presumption of innocence. He must then refrain from "exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judg-

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[3] I do not feel that the quantum of questioning by the court serves alone as an index of the propriety of his participation. But the number here, and the judge's other conduct, make the parallel deadly.

[fol. 257] ment are two quite separate functions in the administration of justice; they must not merge."[4]

It is no excuse that government counsel lacked experience. As the United States has the largest and most expensive law firm in the country, the judge in such circumstances should at most suggest that the assistant United States attorney be guided by a more-experienced prosecutor.[5] For

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[4] L. Hand, *C. J.*, in *U. S.* v. *Marzano*, 149 F. (2d) 923, 926 (C.A. 2). I agree that *Marzano's* case involved a different type of judicial misconduct from that in the *Brandt* and instant cases, but Judge Hand's statement of the principle is nonetheless applicable.

I am at a loss to understand why my colleagues cite *Billeci* v. *U. S.*, 184 F. (2d) 394 (App. D. C.), which reversed a conviction with an explanation which I might adopt here, except that it announces a rule, for the conduct of a trial judge, which is perhaps somewhat stricter in some respects than I would be ready to accept.

My colleagues say that *Simon* v. *U. S.*, 123 F. (2d) 80 (C. A. 4), shows that discretion was here exercised within permissible grounds. I think the report of the *Simon* case discloses no facts which furnish a yardstick for the judge's role in the instant case.

[5] The record indicates that the government undertook to provide such guidance at the trial, when Mr. Burchill, an experienced prosecutor, was advising the assistant who tried the case. Thereupon, the following colloquy took place between a defense attorney and the court:

> "Mr. McAuley: Your Honor, the defense has no objection to Mr. Burchill conducting the examination if he wishes.
>
> The Court: Now, Mr. McAuley, there is no reason for you to make any such statement. Sit down. Perfectly proper for Mr. Burchill, assistant United States attorney, to sit there and to aid a younger, junior assistant. Nothing wrong in that.
>
> Mr. McAuley: I didn't say there was anything wrong.
>
> The Court: Go ahead.

it is no secret that a defense counsel is at a grave disadvantage whenever the judge, interrogating a witness, puts a question which, if put by the prosecutor, would prompt an objection the judge would be obliged to sustain: If the lawyer objects, he may anger the judge and prejudice the jury against the defendant.[6]

[fol. 258] I have not forgotten the comment of this court in the *Brandt* case, that "particular incidents are not to be overstressed apart from their context."[7] But (as was true in the *Brandt* case) the record here shows that the partiality manifest in the court's examination of the defendant Juliano, and of the witnesses (particularly those called by the defense), and in the interjection of cross-examination in the course of direct, was given added color by unwarranted remarks to defense counsel.[8] As Judge A. N. Hand

---

Mr. McAuley: I said we are perfectly willing to have the older assistant——

The Court: You know your comment was improper. Don't do it again. Next question."

[6] *Adler* v. *United States*, 182 Fed. 464, 472 (C. A. 5); Puttkammer, Administration of Criminal Law (1953), 199-200.

[7] 196 F. 2d at 656, fn. 1.

[8] I cnl the following illustrations:

During examination of the defendant Juliano by his counsel and the court alternately, this colloquy occurred:

"The Court: Do you have another question, Mr. McAuley?

Mr. McAuley: Yes.

The Court: I suggest you ask the witness the question, and stop those shenanigans you are doing now.

Mr. McAuley: I am sorry. I must turn the pages.

The Court: Do it in the back. You have had that book around for some time.

Mr. McAuley: Yes, but I haven't lived with it, your Honor. I respectfully except to your Honor's comment.

The Court: That is your fault.

Mr. McAuley: I can't take the Government's word——

said in another case involving a judge's indiscreet criticism [fol. 259] of defense counsel, "The court exhibited unreasonable impatience with defendants' counsel and failed to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial. Furthermore, there plainly was no justification for the constant interference by the court with counsel in their attempt to examine their witnesses. It did not expedite matters for the judge to take over such a large

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The Court: None of these dramatics. Next question.
Mr. McAuley: No dramatics."

During the prosecutor's examination of a government witness:

"Q. Is Joseph C. Juliano here in this court?
A. Yes, he is.
Q. Will you please point him out?
A. He is the man with the blue suit, with the small mustache and heavy hair, black hair.
Prosecutor: Correctly indicating Joseph Juliano.
Q. Did you have a conversation with him at that time?
A. I did.
Q. Did you ask him——
Mr. Chapman (one of defense counsel): Just a moment. Any inquiry made and any answers given would be only binding on Juliano individually.
The Court: I am the one to make that ruling, Mr. Chapman.
Mr. Chapman: I understand.
The Court: Thank you very much for your guidance.
Mr. Chapman: Your Honor, I am sure you don't mean to be sarcastic to me about that."

Defense counsel had a comb in his hand while cross-examining a government witness. This ensued:

"Q. Mr. Andersen, were you with Investigator Ginantasio on March 1st at the Juliano farm?
The Court: Will you put that knife away, or whatever you have in your hand.
Mr. McAuley: Not a knife.

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proportion of the examination and imposed unmerited burdens."[9]

I repeat that I have the highest respect for the trial judge. Accordingly, I would hesitate to criticize him, were nothing more involved than judicial etiquette. But here the liberty of another human being is at stake.

[fol. 260] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court house in the City of New York, on the 20th day of August one thousand nine hundred and fifty-three.

The Court: Put it in your pocket.
Mr. McAuley: Yes."

While the defense was cross-examining another government witness, a government agent, the following unusual rebuff was delivered:

"Q. Did you bring them here? Were you asked to bring all your records?
A. No. Mr. Valenti rented a truck——
Q. Just a minute.
A. —not long ago from us.
Q. Just a minute. You answer the question without volunteering anything, please.
The Court: Let me instruct the witness.
Mr. Chapman: I wish your Honor would then, if you please——
The Court: I will give instructions, if necessary. I don't like counsel to usurp my prerogative. Next question."

It should be noted that the exchange quoted in footnote 2 of my colleagues' opinion came on the heels of the Court's refusal to admonish the same witness, a government agent, for his first unresponsive answer to a cross-question.

[9] *United States* v. *Minuse*, 114 F. (2d) 36, 39 (C. A. 2).

Present: Hon. Harrie B. Chase, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES, Plaintiff-Appellee

v.

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO, Defendant-Appellants

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk by A. Daniel Fusaro.

[fol. 261] [Endorsed:] United States Court of Appeals for the Second Circuit. United States v. Vito Giallo, et al. 258. Judgment. United States Court of Appeals, Second Circuit. Filed Aug. 20, 1953. Alexander M. Bell, Clerk.

[fol. 262] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 263] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONIO VALENTI and JOSEPH C. JULIANO, Petitioners,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed November 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SEP 16 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY K. CHAPMAN,
HAROLD J. MCAULEY,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 20, 1953, affirming a judgment of conviction in this criminal cause.

Opinions Below

There was no opinion in the District Court.

The affirmance in the Court of Appeals was by a divided Court. CHASE, *C.J.* wrote the prevailing opinion concurred

in by CLARK, *C.J.* FRANK, *C.J.* dissented and wrote a separate opinion. The majority and dissenting opinions of the Court of Appeals have not as yet been officially reported, but they are printed at the end of the certified copy of the record filed in this Court and respectfully submitted herewith.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 37(b) of the Rules of Criminal Procedure, and Title 28, Section 1254, United States Code.

Questions Presented

1. In the instant case, did not the participation of the trial judge so far exceed the limits of judicial discretion and propriety as to deprive the petitioners of the fair and impartial trial to which they were entitled?

2. Did not the trial judge by (a) his many acts of advocacy, (b) his evident partiality in his frequent and repetitious direct and cross-examination of witnesses, especially the petitioner, Juliano, and the witnesses called by the defense, (c) his constant interference with defense counsel in their questioning of both prosecution and defense witnesses, (d) his general over-zealousness in "taking over" for the prosecution, and (e) in his unwarranted, harassing and sarcastic remarks to petitioners' counsel, nullify their effective representation of their clients and thus deprive petitioners of their rights under the Fifth and Sixth Amendments to the United States Constitution of a trial by an impartial jury and of due process of law?

3. Did not the trial judge by his unwarranted exhibition of unreasonable impatience with petitioners' counsel and his heaping of sarcasm upon them, fail to maintain

that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial, to the grave prejudice of the petitioners?

4. Was it not an improvident exercise of discretion for the trial court to deny the motion for a mistrial made by counsel for petitioners, Giallo and Valenti, when the prosecution witness, Gianatasio persisted in making unresponsive and gratuitous statements which were calculated and designed to gravely prejudice these petitioners? (144, 147 to 151)*

Proper exception was taken to this ruling of the Court (151).

Statutes Involved

Title 18, Section 371:

> "Conspiracy to Commit Offense or to Defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The indictment in this cause is set out in extenso on pages 13, 14 and 15 of Appendix to Appellants' Brief (37 to 45). The sections of Title 26, United States Code, referred to in paragraph 1 (39) all have to do with the registration and bonding of stills, the taxation of alcohol, the operation of distilleries, the fermenting of mash for distillation purposes and the possession, transportation and sale of untaxpaid liquor. The said sections are not set out in extenso for the reason that to do so would only

* References are to folios of Appendix to Appellants' Brief in the Court below.

encumber the record and would not shed any light upon the reasons, factual and legal, advanced by petitioners for the granting of the relief prayed for in the within petition.

Reasons for Allowing Writ

While counsel is fully cognizant of the difficulty that presents itself in attempting to lay down a rule or to formulate a set of rules for the conduct of a trial judge during the course of a trial, it has been recognized that certain standards are necessary. For instance, a federal trial judge, this Court has said, in *Quercia* v. *United States*, 289 U. S. 466, 469, may not comment on the evidence, unless he advises the jury, at the same time, that they are in no way bound by his views in their determination of the guilt or innocence of the accused and that all matters of fact are submitted to them for their determination.

An overzealous trial judge by injudicious and unjudicial conduct, by injecting himself unduly into the trial, by unlimited participation in disruptive examination and cross-examination of the witnesses called and especially of the accused and their witnesses for the obvious purpose of casting doubt on their veracity and to accentuate whatever inconsistencies there may be therein, by subjecting counsel to harassment and sarcasm, commits seriously prejudicial acts of advocacy and joins the hue and cry against the accused. He thereby lends the great weight of his authority to the prosecution to the grave prejudice of an accused.

Such conduct on the part of a trial judge results in a subtle erosion of the constitutional guarantee afforded an accused by the Fifth and Sixth Amendments to the United States Constitution, of a fair and impartial trial and of due process of law. This is what occurred in the instant case.

Accordingly, it is respectfully submitted that this Honorable Court should exercise its supervisory powers over the federal judiciary and correct this invasion and deprivation of constitutional rights.

In treating with this most important issue, there appears to be a conflict between the various circuits, which despite the difficulty alluded to, should be resolved by this Honorable Court.

See *Adler* v. *United States*, 182 F. 464, 472 (C. A. 5th); *Hunter* v. *United States*, 62 F. 2d 217, 220 (C. A. 5th); *Gomila* v. *Unted States*, 146 F. 2d 372, 373, 375 (C. A. 5th); *Baker* v. *United States*, 156 F. 2d 286, 289 (C. A. 5th); *Williams* v. *United States*, 93 F. 2d 685 (C. A. 9th); *Frantz* v. *United States*, 62 F. 2d 737, 739 (C. A. 6th); *Billeci* v. *United States*, 184 F. 2d 394 (App. D. C.); and *United States* v. *Aaron*, 190 F. 2d 144 (C. A. 2nd), and *Simon* v. *United States*, 123 F. 2nd 80 (C. A. 4th).

Statement

The petitioners, Giallo and Valenti, were charged in Count I of the indictment with Conspiracy to violate a number of sections of the Internal Revenue Regulations having to do with the operation of unlicensed stills, the fermenting of mash, and the possession and sale of alcohol on which the taxes had not been paid (39).

The petitioner, Juliano, was charged in the said indictment with Conspiracy together with the other petitioners above named, and also in Count II with the possession of the still located on his farm property (45).

Prior to the commencement of the trial the Government severed the case as to the defendants, DiLorenzo and Sam Schifano, Sr. (20). The defendants, Bosco, Lango and Cutugno pleaded guilty prior to the commencement of the trial. The defendant, Schick, was never arrested.

The trial commenced on October 9, 1952, and continued on the 10th, 14th, 15th, 16th and 17th days of October, 1952.

On October 20, 1952 the Court instructed the jury, whereupon it retired and deliberated from about 11 A. M. to about 9 P. M., at which time it returned a verdict of guilty against all three petitioners on Count I, the Conspiracy count. It failed to agree as to Juliano on Count II, the substantive count, and was discharged as to him on this count (400 to 402). It acquitted Sam Schifano, Jr. (400). The Court dismissed the indictment as to Carlo M. De Julius at the end of the Government's case.

The theory of the prosecution was that the petitioner Juliano, who was the owner of a farm at West Shokan, New York, had knowingly rented it to one Giollano, for the operation of an illicit still in the barn on his premises, and had knowingly permitted the still to be operated therein. And that the petitioners, Giallo and Valenti, had supplied sugar for the still's operation, and had some interest therein and in its product. However, these petitioners (Giallo and Valenti) were charged only with conspiracy (37 to 45).

On February 15, 1950, investigators of the Alcohol Tax Unit, armed with a search warrant, raided the Juliano farm, where they found in the barn thereof a still which admittedly was unregistered, and which was equipped for the purpose of manufacturing alcohol.

The farm at West Shokan had been purchased by Juliano in 1946. He had lived there with his wife and three small children, attempting to farm the property but without success (238). He also continued working as a handyman doing plumbing and refrigeration work (239, 263, 267). About Labor Day of 1949, this petitioner despaired of making the farm pay, and moved his family to a brother-in-law's dairy farm at New Berlin, New York, about one hundred miles away (234). He determined to dispose of the West Shokan farm and listed it with a broker for sale (240, 241). On several occasions he returned to the West Shokan farm to pick up some of his belongings, more especially tools which he needed in his work (236).

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Juliano had returned to his farm on February 10, 1950 and remained there the following day, the 11th, (336). On the morning of the 12th he left to return to New Berlin (337). He was again returning to the farm on the 16th, when neighbors at the crossroads told him that a large still had been found during a raid on his farm premises the day before (297, 298). He returned to his brother-in-law's place at New Berlin without stopping at his farm (299). On February 20th, when requested by agents of the Alcohol Tax Unit to see them at the farm at West Shokan, he did so (75). He gave the agents a comprehensive story of his life, told them of his purchase of the farm, his failure as a farmer, his attempts to sell the property, and of his decision to move to his brother-in-law's place at New Berlin, where he obtained employment at nearby Sidney, New York (78, 79).

He stated that about December 2, 1949 he returned to the farm, and while there some ten or fifteen days, a man came to the farm and said he was interested in renting the place for the storage of trucks and his car (80, 246). After some haggling Juliano rented the barn and the house, with the exception of one room which he reserved for his own use, to this man for $65 a month (80, 257, 248). The man gave him a card bearing the name Giollano Trucking Corp. (248). He further stated that when he returned to the farm a few days before Christmas, 1949, he found two other men there, one a fellow named Jack (323, 327) who claimed he was the son of the man who rented the farm (273, 329). No arrest followed this interrogation.

On February 27, 1950 Juliano was again requested to appear before the Alcohol Tax Unit agents at their office in Newburgh, New York (116). He responded and was again interrogated, this time by special agents. He was then arrested (317). This happened immediately after Juliano refused to sign a statement prepared by the agents (347, 348). The petitioners Giallo and Valenti, were not seen at the Juliano farm and were not arrested until after the indictment herein was filed on March 29, 1951 (152).

Agents of the Alcohol Tax Unit testified that they observed that the petitioners, Giallo and Valenti, had for some period of time been seen in the immediate vicinity in a certain green colored Ford truck (later testified to by DiLorenzo as having been sold by him to these petitioners (125)). The agents testified that this truck was seen by them on the road which could be taken to go from New York City to West Shokan, New York, and that its destination was finally traced to a farm in that vicinity owned by the petitioner, Juliano. The said green colored truck above mentioned was seized while driven by defendant, Bosco, as it was approaching the farm of the petitioner, Juliano, on the day of the raid, February 15, 1950. Since the granting or denial of this petition does not turn upon the nature of the evidence adduced against the petitioners, Giallo and Valenti and their participation in the conspiracy charged in the indictment, no further details with respect thereto are deemed requisite.

The petitioner, Juliano, testified in his own defense. He was the only one of the petitioners herein to do so. He denied that he knew that the house and barn were being rented for the operation of an illicit distillery, or that he had ever heard anything untoward going on at the farm on the several occasions when he came there in order to secure tools which he needed for his work as a mechanic.

During the six days of the taking of testimony (778 pages), the Court asked approximately 750 questions, of which some 250 alone were directed to the petitioner, Juliano.

POINT I

The Court "took over" the prosecution, severely and persistently cross-examined the defendant, Juliano, only gently remonstrated with Government witnesses, unreasonably interfered with the direct and cross-examination by defense counsel and was unduly impatient and harsh with defense counsel to the point of being sarcastic, without cause. In general, it failed in its duty to maintain the required standard of unswerving impartiality between the Government and the accused.

During the six days of the taking of testimony (778 pages), the Court asked approximately 750 questions. In making this computation, questions which were merely routine such as those usually asked for the purpose of identification have not been considered.

After objection had been made to the answer of the witness, Carroll, that a defendant, Giallo, was "watching the progress of the truck," the Court sustained the objection and taking over the direct examination of this witness proceeded to ask the same question based on what the witness had been "led to say that he was watching the truck" (50, 51).

The Court took over the direct examination of this witness to inquire regarding the elapsed time between the occasions when he saw the appellant, Valenti, and added the description of "circling the premises," which was then not the object of the prosecutor's inquiry (52, 53).

During the direct examination of a Government witness who had answered using the words "illicit distillery," the Assistant United States Attorney moved to strike out the word "illicit." The Court then said, "If the defendants don't move, no reason why you should move" (54).

Compare this thoroughly partial statement with the Court's own admission of error in the use of this word on page 55 of the stenographic transcript.

The Court on its own motion interposed an objection to a question on cross-examination, which was designed to indicate that a truck did not travel on other than main arteries of travel and thus not in a surreptitious manner, sustained its own objection and proceeded to ask the same question in another fashion. Although the answers elicited by the Court's questions did not prejudice the defendants, the manner in which it was done, was calculated to cast doubt on either counsel's ability to properly formulate the inquiries or what is worse, counsel's desire to establish the truth (54, 55, 60).

The Court unwarrantedly and severely criticized counsel for not objecting to an answer before it was given by the witness. Although the Court struck out the answer, its criticism was harsh and cast doubt on counsel's ability or honest intention in the circumstances (57, 58).

The Court again was caustic in observing that he was the one who made the rulings and sarcastic in thanking counsel for his "guidance," all of which was thoroughly unwarranted. The Court then proceeded to make an erroneous statement of the legal reason for the admissions of Juliano after the raid on the still, being binding only on him and not on the other defendants on trial (75 to 77).

The Court interrupted the cross-examination of a Government witness and took over the examination (93 to 99).

The Court interrupted the cross-examination of a Government witness and criticized counsel for an alleged presumptuous remark; an entirely unwarranted and unnecessary action (120, 121).

The Court interjected itself in the direct examination of a Government witness giving testimony on a most crucial issue, and assuming the role of prosecutor in a series

of eleven questions, adduced what the Assistant United States Attorney apparently was unable to do; and finally succeeded in getting this witness to testify that a truck he allegedly sold to the defendants, Giallo and Valenti, was being bought first "to carry a heavy load," then "a heavy load of sugar" and finally "for the illegal purpose of alcohol and sugar" (129).

The Court unduly and erroneously restricted the cross-examination of a Government witness as to the facts of the crime of manslaughter of which he had been convicted and was then serving a sentence imposed by the Courts of the State of Connecticut. When counsel persisted, the Court hampered him on an important issue and unduly and erroneously limited him. This served to rehabilitate a twice convicted criminal witness and elicited his thanks to the Court (131 to 135).

The Court permitted this witness, Di Lorenzo, who was named as a defendant in the indictment being tried, against whom the trial had been severed, but who continuously and persistently claimed that he was innocent and who had at no time entered a plea of guilt, to testify to facts which were completely incriminating, without any warning as to his constitutional rights. Then the Court proceeded to further rehabilitate this witness and intimate to the jury by asking questions and making statements, that because this witness had not had any part in the "running of this still" or the "distilling of alcohol" and was "just a customer," he was innocent of the charge of conspiracy in the indictment. The Court further erred on the law, after the said witness' connection was alluded to by counsel, by saying that it was "for the jury to say whether it was part of the conspiracy", when this very testimony was being adduced by the prosecution to prove that Giallo and Valenti were guilty of the conspiracy there charged. In other words, the Court erroneously stated by implication, that although this witness had admitted by his testimony that he was a co-conspirator with Giallo and Valenti and had

purchased alcohol from them, he might nevertheless, not be guilty, and it was for jury determination whether the others were, based on his testimony. A most anomalous situation in the light of the evidence (136 to 139).

The Court undertook to make pointed inquiry and then critically commented on counsel's purpose in his cross-examination (161 to 165).

The Court, without any inquiry as to the object counsel had in his hand, which was a comb, told counsel to "put that knife away, or whatever you have in your hand" (166).

The Court interrupted the cross-examination of a Government agent, took over, and acted as prosecutor (167, 168).

Upon the prosecution's offer of exhibits in evidence consisting of samples of the contents of mash vats, and objection being made that no connection between the exhibits and the defendants, Giallo and Valenti, had been established, the Court abdicated its province and stated it was for the jury to determine whether these defendants "are connected with this bottle or its contents" (170 to 171).

The Court proceeded to unwarrantedly and unreasonably criticize counsel's manner of cross-examination of a government witness (173 to 175).

The Court once again assumed the role of prosecutor in eliciting testimony as to a Government's witness' identification of a photograph of one of the defendants, unwarrantedly interrupting the cross-examination of this witness (177).

The Court interrupted the cross-examination of a Government witness whose testimony as to a very material fact, his absence from his place of employment due to sickness on the days he is alleged to have observed the absence from the garage of the green Ford truck, and to have so

informed the witness who preceded him, by saying "Is that a fact, or was it just a week-end indisposition?" (180).

The Court again became prosecutor, interrupted the cross-examination of this witness and proceeded to ask twenty-five consecutive questions (182 to 195).

The Court "took over" the direct examination of the witness, Roschitsch, and relieved the prosecution (195 to 212).

The Court unwarrantedly came to the assistance of a Government witness, interrupting counsel's cross-examination (215 to 216).

The Court again "took over" the duties of direct examination, properly belonging to the prosecutor and asked thirteen consecutive questions (218 to 221) and the very same thing occurred at folios 222 to 225.

The Court instead of admonishing the witness for volunteering unresponsive answers, criticized counsel for allegedly usurping his prerogative (226).

The appellant, Juliano, was the only one to take the stand. The Court during his direct and cross-examination continuously and persistently interrupted both the Assistant United States Attorney and defense counsel and asked of this appellant alone approximately 266 questions, exclusive of those the plain purpose of which was clarification. When asking these questions the Court clearly expressed its disbelief of this appellant's veracity, but what is worse, it conducted the cross-examination thus relieving the prosecution of its legal burden. It assumed the role of a partisan and joined the hue and cry against all the accused (*U. S.* v. *Hunter*, 62 F. 2d 217, 220; *U. S.* v. *Marzano*, 149 F. 2d 923).

The Court interrupted the direct examination of the defendant, Juliano, and began to cross-examine him on his competency in pipe-fitting, it having been testified to, that this defendant had purchased a small quantity of pipe and

fittings and it having been previously adduced in evidence that when the still premises were raided, parts of the still had had pipe connections. The purpose was evidently to show that this defendant had purchased the pipe and fitted it on to the still. This was for the prosecution to do and not for the Court. It thus assumed once again the role of prosecutor (231 to 232).

Again the Court broke into the direct examination of Juliano and asked 34 consecutive questions all of which were designed as the most severe cross-examination (252 to 259).

The Court unwarrantedly held Juliano's counsel up to ridicule when he charged him with attempting "to contradict his own witness" (276). And again, the Court undertook without any warrant to criticize this attorney for his "dramatics" and instructed him "to stop those shenanigans" (289 to 290).

The Court once more interrupted the direct examination of Juliano, became once again the prosecutor and cross-examined him severely on the size of the still which he had maintained he didn't know existed in the barn (297 to 299). And shortly after, the Court resumed his interruption of the direct examination to cross-examine him about his not going into the barn (314 to 315). The Court also took it upon itself to cross-examine Juliano pointedly about a revolver he said he had left in his desk at the farmhouse (324).

Relieving the prosecution of its burden and becoming an out and out partisan, the Court interrupted the cross-examination of Juliano and proceeded to ask 19 consecutive questions on its own cross-examination. All these questions were for the obvious purpose of discrediting the witness and this is well pointed up by the Court's gratuitous comment to the effect that the defendant impressed the Court as an alert young man (326 to 330). This statement coupled with the subsequent cross-examination of the Court

was solely calculated to cast doubt on this witness' credibility and to apprise the jury that it was the Court's opinion that he could not be as credulous as was made to appear. The additional statement "Of course, the jury is to determine whether you are alert" (327) served only to accentuate the harm and prejudice.

Once again the Court interrupted the cross-examination by the prosecutor to embark on its own cross-examination and asked 44 consecutive questions, all designed to discredit the witness (332 to 339).

The Court became cross-examiner and "took over" from the prosecution; it severely interrogated this defendant asking 14 consecutive questions with regard to a statement (Govt.'s Exh. 63 for Iden.) which Juliano had refused to sign 348 to 351). And the Court pursued this tack when it cross-examined Juliano and asked 34 consecutive questions of him relative to a pair of telephones and wire (360 to 365). The Court continued the same severe cross-examination for the sole purpose of breaking down this witness, thereby once again relieving the prosecution, becoming a partisan and failing to observe the unswerving standard of impartiality (366 to 369).

Even when the witness, Joan Jordan, took the stand, the Court could not refrain from its course of unwarranted interference with cross-examination and proceeded to ask 17 consecutive questions (389 to 391).

It will be observed that the Court "took over" for the prosecution and interrupted direct examination and cross-examination as the whim struck it, asked long series of questions for the obvious purpose of casting doubt on the veracity of the defendant, Juliano, and the defense witnesses. The Court was overzealous in this respect. Counsel were prevented from properly representing their respective clients because of the fear of injuring their clients' cause by objecting to the Court's advocacy and harassing interrogations which were repeated so often. On the other

hand, the Court was most gentle in its treatment of the witnesses for the prosecution even when they gratuitously injected unresponsive matter calculated to cause grave prejudice to the accused.

Regarded separately and singly these acts on the part of the trial judge may appear magnified, but their cumulative effect was such as to deprive the petitioners of the fair and impartial trial and due process of law guaranteed to them by the Fifth and Sixth Amendments to the United States Constitution (*United States* v. *Brandt* (C. A. 2), 196 F. 2d 653).

The majority opinion grudgingly admits that "The record does show that the judge took an active part in the examination of witnesses which seems to have been more extensive and less even tempered than is to be commended." However, it does not find that the trial judge was so partial and so much an advocate for the prosecution as to require a reversal. It cites the case of *United States* v. *Marzano*, (2 Cir.) 149 F. 2d 923. As pointed out in the dissenting opinion of FRANK, *C.J.*, the error in that case involved a different type of judicial misconduct, i.e., direct threats by the trial judge against a witness, but the principle of law there stated by Judge LEARNED HAND is none the less applicable to the facts in the instant case.

As is further pointed out in the dissenting opinion, the trial judge, by his inordinate participation in the examination and cross-examination of the defense witnesses at the trial, violated the principle of law stated in *Quercia* v. *United States*, 289 U. S. 466, 469. He patently disclosed by his manner of questioning the defense witnesses, his disbelief in their veracity. But when the judge did so, his disbelief was implied and not expressed, and was not coupled with the warning that this Court said in the *Quercia* case, must be given to a jury contemporaneously, to the effect that they must reach their own independent conclusion as to all matters of fact and especially with respect to the guilt or innocence of the accused.

In *Adler* v. *United States* (5 Cir.), 182 F. 464, 472, the Court said:

> "The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of defendant's witnesses we can readily see that if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it.
>
> A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is a direct conflict between them and the court. If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so inevitable.

> Counsel are expected to maintain an attitude of respect and deference toward the judge, and this attitude is maintained without difficulty when the judge confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case."

In *Hunter* v. *United States* (5 Cir.), 62 F. 2d 217, 220, it was held:

> "The assignments of error based on the district judge's cross-examination of appellant, are, in our opinion, well taken. While the method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in *Adler* v. *United States*, 5th Cir. 182 F. 464 * * *. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial."

And in *Baker* v. *United States* (5 Cir.), 156 F. 2d 386, 389, it is stated:

> "Firmly committed, as we are, to the proposition that while it is the duty of a trial judge to conduct the trial with firmness, understanding and judgment, it is equally his duty to conduct it with patience,

politeness, fairness and moderation and that he is not to dominate the trial or to do more than, as administrator of it, keep it within legal bounds * * *."

In *Williams* v. *United States* (9 Cir.), 93 F. 2d 685, the Court held:

"The harm done when the trial judge departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial is not diminished because the judge so acts by reason of unrestrained zeal or through inadvertence and is unintentionally unfair.

It is improper for the court to take away the examination of witnesses from counsel when they are conducting their cases in an able and lawyer-like manner and then conduct the examinations his own way."

It is respectfully contended that the trial judge in the instant case became a partisan for the prosecution and in a very large measure took over the duties of the prosecutor, which obviously was a biased and partial act of advocacy. A very apt statement of the proposition contended for by petitioners is to be found in *United States* v. *Billeci* (App. D. C.), 184 F. 2d 394, 403. There the Court said:

"The public interest requires that persons who have committed crimes be convicted of them. But the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution, the attorney for the defense represents the accused. The judge is a disinterested and objective participant in the proceeding. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge" (Judge Learned Hand in *United States* v. *Marzano*, 149 F. 2d 923, 926).

* * * * *

> "It is a serious thing for an appellate court to reverse convictions in criminal cases. But the controlling importance is that the law be followed. The rules of law applicable to the function of the judge in a criminal trial by a jury are well settled. No matter what the impulse may be to transgress or evade them under provocative circumstances they must be observed. This is basic, without exception and compulsory."

The record here amply indicates that the trial judge failed in this duty to the grave prejudice of the petitioners.

Since Juliano testified that he at no time had known or seen the petitioners, Giallo and Valenti, prior to their meeting in the courthouse when arraigned for pleading to the indictment which was on April 6, 1951, something like 15 months after the seizure of the still (5, 372 to 377), the continuous cross-examination by the Court of this petitioner for the sole and evident purpose of discrediting his testimony, the advocacy of the Court and the "taking over" of the prosecution by the Court, could only serve to reflect adversely on Giallo's and Valenti's interests (*Williams* v. *United States*, 93 F. 2d 685, at pp. 688, 689).

The majority in the Court of Appeals significantly fails to make mention of the decision of its own Court in *United States* v. *Brandt* (C. A. 2), 196 F. 2d 653. In said case, the Court of Appeals for the Second Circuit held that activities of the trial judge, markedly similar to those here, constituted reversible error. As FRANK, *C.J.*, says in his dissenting opinion in referring to said case (*United States* v. *Brandt*, supra):

> "There we said that the trial judge must remain impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. * * * In the case at bar this mandate of judiciousness appears to have

been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled. Beyond this the court actively cross-examined several witnesses, notably the defendant Brandt himself, to a quite unusual extent. This interrupted the orderly presentation of evidence by the defense. But further the questioning appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses.' In *Brandt's* case, the government, on the strength of *United States* v. *Aaron*, 190 F. (2d) 144 (C. A. 2), cited here by my colleagues, had argued that the charge had cured these defects. This Court replied: 'Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here. For the 900 questions asked by the court during this eight-day trial present far more examples of serious incidents. The cumulative effect of these we are unable to hold cured by the formal charge given.'"

At this point it is most appropriate to refer to the statement by JACKSON, *J.*, in *Krulewich* v. *United States*, 338 U. S. 716, 722, 723:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, see *Blumenthal* v. *United States*, 332 U. S. 535, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *B. & O. Railroad Co.*, 2nd Cir., 167 F. 2d 54."

In *Simon* v. *United States* (4 Cir.), 123 F. 2d 80, it appears that the Court questioned the witness "from time to time" in an effort to bring out the facts of the case and the report of this case as said by FRANK, *C.J.*, "discloses no facts which furnish a yardstick for the judge's role in the instant case."

Likewise in *United States* v. *Aaron* (2 Cir.), 190 F. 2d 144, 147, in commenting upon the complaint that the trial judge had unduly participated in the questioning of witnesses and had assumed a prosecutor's role, the Court said:

> "Much of the fault found with him (the trial judge) concerns what did not occur within the presence of the jury."

Consequently, neither do the facts in said case furnish a proper measure for comparison with the conduct of the trial judge in the instant case.

The trial court's unwarranted criticism of defense counsel and its indiscretion in this regard was referred to by judge A. N. HAND of the Court of Appeals for the Second Circuit in another case (*United States* v. *Minuse*, 114 F. 2d 36, 39), in the following manner:

> "The court exhibited unreasonable impatience with defendants' counsel and failed to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial. Furthermore, there plainly was no justification for the constant interference by the court with counsel in their attempt to examine their witnesses. It did not expedite matters for the judge to take over such a large proportion of the examination and imposed unmerited burdens."

Of course, as is pointed out in the dissenting opinion, "It is no excuse that government counsel lacked experience." As a matter of fact, the assistant district attorney, who is described so disparagingly by his superior in his brief in the Court of Appeals, as being inexperienced and "manifestly not a master of the art of cross-examination," was at all times during the trial attended and assisted by two other assistant United States attorneys of many years of trial experience, Messrs. Kaplan and Burchill.

POINT II

It was an improvident exercise of discretion to deny the motion for a mistrial made on behalf of Giallo and Valenti.

The witness, Gianatasio, an agent of the Alcohol Tax Unit, with more than twenty years service in this capacity, deliberately set out to bring to the attention of the jury the fact *that he was known to Valenti* (143). When being interrogated on cross-examination as to where Bosco and Valenti had gone and after having indicated that it was to a restaurant, he added the gratuitous and unresponsive statement, "*Because I figured he might know me*" (143). The purpose of this statement was obviously to convey to the jury that he, an agent of the Alcohol Tax Unit, was known to Valenti, and this despite the unwitting use of the subjunctive mood.

It is true that when counsel for Valenti moved to strike this statement as gratuitous and voluntary, the Court did so, but it is significant that it curtly refused to admonish the witness (144). By such refusal it not only created the impression on the jury that what the witness had done was not improper but it served to encourage the witness to repeat the offense, as is evidenced by his deliberate injection of a further gratuitous, voluntary and most prejudicial observation as to the defendant, Giallo (147, 148):

> "Q. And when you seized the Plymouth black sedan from Mr. Giallo, he told you to all your questions, directly that he didn't know anything about it and had never been in West Shokan, is that right? A. That is right. *I also told him the reason I wasn't arresting him was because he was out on bail*——" (Emphasis supplied.)

The only reason one can assign for this unresponsive, additional, gratuitous and most harmful observation is a preconceived, deliberate and purposeful attempt to bring to the attention of the jury the fact that he, an Alcohol Tax Unit agent was aware of the fact that Giallo was then at large on bail. Considering his capacity as an enforcement officer of the Alcohol Tax Unit, which had been brought to the jury's attention by the prosecution immediately this witness was sworn, this statement was most prejudicial and the jury could arrive at no other conclusion but that Giallo was then "out on bail" in connection with an offense or crime of which the witness was cognizant as a result of his official connection with the Alcohol Tax Unit, i.e., a similar crime to that for which Giallo was then on trial.

When counsel most respectfully and with the utmost deference and courtesy, informed the Court that he was going to move for a mistrial if any more voluntary statements were forthcoming from this witness (148), the Court instead of now admonishing the witness (which it had refused to do on the occasion of the first breach) (144), commenced to berate counsel for his manner of addressing the Court. By contrast, its manner of advising the witness to desist from similar statements was actually gentle (149).

But what stands out like the proverbial sore thumb is that after ordering this statement stricken from the record, the Court made the following rejoinder to counsel's motion for a mistrial (149, 159):

> "Mr. Chapman: I think for the record, I ought to move for a mistrial because the witness has twice volunteered statements not responsive to any questions, and serving to prejudice my client.
>
> The Court: I don't regard that as prejudicial.
>
> Mr. Chapman: Your Honor will overrule it?
>
> The Court: The jury will erase anything from their minds that I have stricken from the record.
>
> Mr. Chapman: That is a very, sometimes a very hard thing to do."

The Court thereupon, without inquiring of counsel as to his acquiescence in the procedure, inquired of the jury whether the remarks of the witness, which it had already stated it considered *unprejudicial*, would in any way cause them not to give fair consideration to the "guilt or innocence of any of these defendants", determined that the jury had "indicated in the negative", and denied the motion (150, 151).

Thus the Court actually criticized counsel, whereas the criticism should have been visited on the witness. It further accentuated the prejudice in the remark of the witness by addressing the jury with respect to it.

With respect to this contention, the majority in the Court below takes the attitude that counsel for the petitioners Giallo and Valenti increased any likelihood of harm by making it appear of record that the petitioner, Giallo, was not arrested on the indictment in this case until March 29, 1951, after it was filed.

It is respectfully submitted that this criticism is unwarranted and counsel would have been remiss in his duty had he left the matter to the speculation of the jury. Since it is contended that these unresponsive, gratuitous and prejudicial remarks were preconceived, deliberate, and made with the purpose in mind of conveying to the jury that the petitioners had previously been in conflict with the law relative to alcohol taxes, it would have been the height of stupidity to permit the implication and in fact the express statement of the trial judge that they were *not* prejudicial (159) sought to be implanted in the jury's mind, to go unchallenged. Therefore, the statement that it was defense counsel who accentuated the likelihood of harm caused by the government's witness' statements is, it is respectfully submitted, without any fair basis in fact or law.

Lastly, there are, to be sure, cases which hold generally that prompt action by the Court in striking unresponsive, prejudicial but inadvertent remarks of a witness, dispels

the harm done and is not cause for a mistrial (*United States* v. *Hilliard*, 121 F. 2d 992; *United States* v. *Hirsch*, 74 F. 2d 215; *United States* v. *Kushner*, 135 F. 2d 668, 674; *United States* v. *Curzio*, 179 F. 2d 380). But there is no case which holds that a bald statement by the Court that an unresponsive, gratuitous, voluntary and harmful (and the record shows that it was not inadvertent but deliberate) answer was not prejudicial, can be cured by the Court ordering it stricken and then pointedly inquiring of the jury whether it would be prejudiced. (See dissenting opinion in *United States* v. *Stoppelli*, 183 F. 2d 391.)

CONCLUSION

It is submitted that there is involved in this criminal cause the serious question whether the petitioners' constitutional rights to a fair and impartial trial and due process of law under the Fifth and Sixth Amendments to the United States Constitution were not nullified by the excessive zeal of the trial judge and his uneven-tempered and inordinate participation in the trial, and that the serious and prejudicial errors thus committed, warrant the exercise of this Court's supervisory jurisdiction by issuance of a Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONINO VALENTI and JOSEPH C. JULIANO,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Opinions Below

No opinion was rendered by the District Court. The affirmance in the United States Court of Appeals for the Second Circuit was by a divided Court. Chase, Ch. J., wrote the prevailing opinion concurred in by Clark, C. J. Frank, C. J., wrote the dissenting opinion. These opinions are reported at 206 F. 2d 207.

Jurisdiction

The judgment of the Court of Appeals was entered on August 20, 1953. The Petition for a Writ of Certiorari

was filed September 16, 1953. Certiorari was granted by order of this Court on November 9, 1953.

The jurisdiction of this Court is invoked under Rule 37 (b) of the Rules of Criminal Procedure and Title 28, Section 1254, United States Code.

Questions Presented

1. In the instant case, did not the participation of the trial judge so far exceed the limits of judicial discretion and propriety as to deprive the petitioners of the fair and impartial trial to which they were entitled?

2. Did not the trial judge by (a) his many acts of advocacy, (b) his evident partiality in his frequent and repetitious direct and cross-examination of witnesses, especially the petitioner, Juliano, and the witnesses called by the defense, (c) his constant interference with defense counsel in their questioning of both prosecution and defense witnesses, (d) his general over-zealousness in "taking over" for the prosecution, and (e) in his unwarranted, harassing and sarcastic remarks to petitioners' counsel, nullify their effective representation of their clients and thus deprive petitioners of their rights under the Fifth and Sixth Amendments to the United States Constitution of a trial by an impartial jury and of due process of law?

3. Did not the trial judge by his unwarranted exhibition of unreasonable impatience with petitioners' counsel and his heaping of sarcasm upon them, fail to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial, to the grave prejudice of the petitioners?

4. Was it not an improvident exercise of discretion for the trial court to deny the motion for a mistrial made by

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counsel for petitioners, Giallo and Valenti, when the prosecution witness, Gianatasio persisted in making unresponsive and gratuitous statements which were calculated and designed to gravely prejudice these petitioners? (144, 147 to 151).* Proper exception was taken to this ruling of the Court (151).

Statutes Involved

Title 18, Section 371:

> "Conspiracy to Commit Offense or to Defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The indictment in this cause is set out in extenso on pages 13, 14 and 15 of Appendix to Appellants' Brief (37 to 45). The sections of Title 26, United States Code, referred to in paragraph 1 (39) all have to do with the registration and bonding of stills, the taxation of alcohol, the operation of distilleries, the fermenting of mash for distillation purposes and the possession, transportation and sale of untaxpaid liquor. The said sections are not set out in extenso for the reason that to do so would only encumber the record and would not shed any light upon the reasons, factual and legal, advanced by petitioners for the granting of the relief prayed for in the within petition.

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* References are to folios of Appendix to Appellants' Brief in the Court below.

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Statement

The petitioners, Giallo and Valenti, were charged in Count I of the indictment with Conspiracy to violate a number of sections of the Internal Revenue Regulations having to do with the operation of unlicensed stills, the fermenting of mash, and the possession and sale of alcohol on which the taxes had not been paid (39).

The petitioner, Juliano, was charged in the said indictment with Conspiracy together with the other petitioners above named, and also in Count II with the possession of the still located on his farm property (45).

Prior to the commencement of the trial the Government severed the case as to the defendants, DiLorenzo and Sam Schifano, Sr. (20). The defendants, Bosco, Lango and Cutugno pleaded guilty prior to the commencement of the trial. The defendant, Schick, was never arrested.

The trial commenced on October 9, 1952, and continued on the 10th, 14th, 15th, 16th and 17th days of October, 1952. On October 20, 1952 the Court instructed the jury, whereupon it retired and deliberated from about 11 A. M. to about 9 P. M., at which time it returned a verdict of guilty against all three petitioners on Count I, the Conspiracy count. It failed to agree as to Juliano on Count II, the substantive count, and was discharged as to him on this count (400 to 402). It acquitted Sam Schifano, Jr. (400). The Court dismissed the indictment as to Carlo M. De Julius at the end of the Government's case.

The theory of the prosecution was that the petitioner Juliano, who was the owner of a farm at West Shokan, New York, had knowingly rented it to one Giollano, for the operation of an illicit still in the barn on his premises, and had knowingly permitted the still to be operated therein. And that the petitioners, Giallo and Valenti, had supplied sugar for the still's operation, and had some interest

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therein and in its product. However, these petitioners (Giallo and Valenti) were charged only with conspiracy (37 to 45).

On February 15, 1950, investigators of the Alcohol Tax Unit, armed with a search warrant, raided the Juliano farm, where they found in the barn thereof a still which admittedly was unregistered, and which was equipped for the purpose of manufacturing alcohol.

The farm at West Shokan had been purchased by Juliano in 1946. He had lived there with his wife and three small children, attempting to farm the property but without success (238). He also continued working as a handyman doing plumbing and refrigeration work (239, 263, 267). About Labor Day of 1949, this petitioner despaired of making the farm pay, and moved his family to a brother-in-law's dairy farm at New Berlin, New York, about one hundred miles away (234). He determined to dispose of the West Shokan farm and listed it with a broker for sale (240, 241). On several occasions he returned to the West Shokan farm to pick up some of his belongings, more especially tools which he needed in his work (236).

Juliano had returned to his farm on February 10, 1950 and remained there the following day, the 11th (336). On the morning of the 12th he left to return to New Berlin (337). He was again returning to the farm on the 16th, when neighbors at the crossroads told him that a large still had been found during a raid on his farm premises the day before (297, 298). He returned to his brother-in-law's place at New Berlin without stopping at his farm (299). On February 20th, when requested by agents of the Alcohol Tax Unit to see them at the farm at West Shokan, he did so (75). He gave the agents a comprehensive story of his life, told them of his purchase of the farm, his failure as a farmer, his attempts to sell the property, and of his decision to move to his brother-in-law's place at New Berlin, where he obtained employment at nearby Sidney, New York (78, 79).

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He stated that about December 2, 1949 he returned to the farm, and while there some ten or fifteen days, a man came to the farm and said he was interested in renting the place for the storage of trucks and his car (80, 246). After some haggling Juliano rented the barn and the house, with the exception of one room which he reserved for his own use, to this man for $65 a month (80, 257, 248). The man gave him a card bearing the name Giollano Trucking Corp. (248). He further stated that when he returned to the farm a few days before Christmas, 1949, he found two other men there, one a fellow named Jack (323, 327) who claimed he was the son of the man who rented the farm (273, 329). No arrest followed this interrogation.

On February 27, 1950 Juliano was again requested to appear before the Alcohol Tax Unit agents at their office in Newburgh, New York (116). He responded and was again interrogated, this time by special agents. He was then arrested (317). This happened immediately after Juliano refused to sign a statement prepared by the agents (347, 348). The petitioners Giallo and Valenti, were not seen at the Juliano farm and were not arrested until after the indictment herein was filed on March 29, 1951 (152).

Agents of the Alcohol Tax Unit testified that they observed that the petitioners, Giallo and Valenti, had for some period of time been seen in the immediate vicinity in a certain green colored Ford truck (later testified to by DiLorenzo as having been sold by him to these petitioners (125)). The agents testified that this truck was seen by them on the road which could be taken to go from New York City to West Shokan, New York, and that its destination was finally traced to a farm in that vicinity owned by the Petitioner, Juliano. The said green colored truck above mentioned was seized while driven by defendant, Bosco, as it was approaching the farm of the petitioner, Juliano, on the day of the raid, February 15, 1950. Since the granting or denial of this petition does not turn upon the nature of the evidence adduced against the petitioners,

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Giallo and Valenti and their participation in the conspiracy charged in the indictment, no further details with respect thereto are deemed requisite.

The petitioner, Juliano, testified in his own defense. He was the only one of the petitioners herein to do so. He denied that he knew that the house and barn were being rented for the operation of an illicit distillery, or that he had ever heard anything untoward going on at the farm on the several occasions when he came there in order to secure tools which he needed for his work as a mechanic.

During the six days of the taking of testimony (778 pages), the Court asked approximately 750 questions, of which some 250 alone were directed to the petitioner, Juliano.

Specification of Errors to be Urged

The Court of Appeals erred:

1. In affirming the judgment of the District Court, holding that the petitioners were not gravely prejudiced and that their constitutional rights under the Fifth and Sixth Amendments of the United States Constitution, to a fair and impartial trial and due process of law, were not nullified by the excessive zeal of the trial judge and his uneventempered and inordinate participation in the trial.

2. In affirming the judgment of the District Court, holding that it had not improvidently exercised its discretion in denying the motion for a mistrial made on behalf of the petitioners, Giallo and Valenti, when the witness, Gianatasio (a government agent) deliberately persisted in making gratuitous, unresponsive and prejudicial statements, in refusing to admonish this witness and in declaring his statements to be unprejudicial.

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ARGUMENT

POINT I

The Court "took over" the prosecution, severely and persistently cross-examined the defendant, Juliano, only gently remonstrated with Government witnesses, unreasonably interfered with the direct and cross-examination by defense counsel and was unduly impatient and harsh with defense counsel to the point of being sarcastic, without cause. In general, it failed in its duty to maintain the required standard of unswerving impartiality between the Government and the accused. It thereby nullified the petitioners' constitutional rights under the Fifth and Sixth Amendments of the United States Constitution, to a fair and impartial trial and due process of law.

During the six days of the taking of testimony (778 pages), the Court asked approximately 750 questions. In making this computation, questions which were merely routine such as those usually asked for the purpose of identification have not been considered.

After objection had been made to the answer of the witness, Carroll, that a defendant, Giallo, was "watching the progress of the truck," the Court sustained the objection and taking over the direct examination of this witness proceeded to ask the same question based on what the witness had been "led to say that he was watching the truck" (50, 51).

The Court took over the direct examination of this witness to inquire regarding the elapsed time between the occasions when he saw the appellant, Valenti, and added the description of "circling the premises," which was then not the object of the prosecutor's inquiry (52, 53).

During the direct examination of a Government witness who had answered using the words "illicit distillery," the Assistant United States Attorney moved to strike out the word "illicit." The Court then said, "If the defendants don't move, no reason why you should move" (54). Compare this thoroughly partial statement with the Court's own admission of error in the use of this word on page 55 of the stenographic transcript.

The Court on its own motion interposed an objection to a question on cross-examination, which was designed to indicate that a truck did not travel on other than main arteries of travel and thus not in a surreptitious manner, sustained its own objection and proceeded to ask the same question in another fashion. Although the answers elicited by the Court's questions did not prejudice the defendants, the manner in which it was done, was calculated to cast doubt on either counsel's ability to properly formulate the inquiries or what is worse, counsel's desire to establish the truth (54, 55, 60).

The Court unwarrantedly and severely criticized counsel for not objecting to an answer before it was given by the witness. Although the Court struck out the answer, its criticism was harsh and cast doubt on counsel's ability or honest intention in the circumstances (57, 58).

The Court again was caustic in observing that he was the one who made the rulings and sarcastic in thanking counsel for his "guidance," all of which was thoroughly unwarranted. The Court then proceeded to make an erroneous statement of the legal reason for the admissions of Juliano after the raid on the still, being binding only on him and not on the other defendants on trial (75 to 77).

The Court interrupted the cross-examination of a Government witness and took over the examination (93 to 99).

The Court interrupted the cross-examination of a Government witness and criticized counsel for an alleged pre-

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sumptuous remark; an entirely unwarranted and unnecessary action (120, 121).

The Court interjected itself in the direct examination of a Government witness giving testimony on a most crucial issue, and assuming the role of prosecutor in a series of eleven questions, adduced what the Assistant United States Attorney apparently was unable to do; and finally succeeded in getting this witness to testify that a truck he allegedly sold to the defendants, Giallo and Valenti, was being bought first "to carry a heavy load," then "a heavy load of sugar" and finally "for the illegal purpose of alcohol and sugar" (129).

The Court unduly and erroneously restricted the cross-examination of a Government witness as to the facts of the crime of manslaughter of which he had been convicted and was then serving a sentence imposed by the Courts of the State of Connecticut. When counsel persisted, the Court hampered him on an important issue and unduly and erroneously limited him. This served to rehabilitate a twice convicted criminal witness and elicited his thanks to the Court (131 to 135).

The Court permitted this witness, Di Lorenzo, who was named as a defendant in the indictment being tried, against whom the trial had been severed, but who continuously and persistently claimed that he was innocent and who had at no time entered a plea of guilt, to testify to facts which were completely incriminating, without any warning as to his constitutional rights. Then the Court proceeded to further rehabilitate this witness and intimate to the jury by asking questions and making statements, that because this witness had not had any part in the "running of this still" or the "distilling of alcohol" and was "just a customer," he was innocent of the charge of conspiracy in the indictment. The Court further erred on the law, after the said witness' connection was alluded to by counsel, by saying that it was "for the jury to say whether it was part of the conspiracy", when this very testimony was being ad-

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duced by the prosecution to prove that Giallo and Valenti were guilty of the conspiracy there charged. In other words, the Court erroneously stated by implication, that although this witness had admitted by his testimony that he was a co-conspirator with Giallo and Valenti and had purchased alcohol from them, he might nevertheless, not be guilty, and it was for jury determination whether the others were, based on his testimony. A most anomalous situation in the light of the evidence (136 to 139).

The Court undertook to make pointed inquiry and then critically commented on counsel's purpose in his cross-examination (161 to 165).

The Court, without any inquiry as to the object counsel had in his hand, which was a comb, told counsel to "put that knife away, or whatever you have in your hand" (166).

The Court interrupted the cross-examination of a Government agent, took over, and acted as prosecutor (167, 168).

Upon the prosecution's offer of exhibits in evidence consisting of samples of the contents of mash vats, and objection being made that no connection between the exhibits and the defendants, Giallo and Valenti, had been established, the Court abdicated its province and stated it was for the jury to determine whether these defendants "are connected with this bottle or its contents" (170 to 171).

The Court proceeded to unwarrantedly and unreasonably criticize counsel's manner of cross-examination of a government witness (173 to 175).

The Court once again assumed the role of prosecutor in eliciting testimony as to a Government's witness' identification of a photograph of one of the defendants, unwarrantedly interrupting the cross-examination of this witness (177).

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The Court interrupted the cross-examination of a Government witness whose testimony as to a very material fact, his absence from his place of employment due to sickness on the days he is alleged to have observed the absence from the garage of the green Ford truck, and to have so informed the witness who preceded him, by saying "Is that a fact, or was it just a week-end indisposition?" (180).

The Court again became prosecutor, interrupted the cross-examination of this witness and proceeded to ask twenty-five consecutive questions (182 to 195).

The Court "took over" the direct examination of the witness, Roschitsch, and relieved the prosecution (195 to 212).

The Court unwarrantedly came to the assistance of a Government witness, interrupting counsel's cross-examination (215 to 216).

The Court again "took over" the duties of direct examination, properly belonging to the prosecutor and asked thirteen consecutive questions (218 to 221) and the very same thing occurred at folios 222 to 225.

The Court instead of admonishing the witness for volunteering unresponsive answers, criticized counsel for allegedly usurping his prerogative (226).

The appellant, Juliano, was the only one to take the stand. The Court during his direct and cross-examination continuously and persistently interrupted both the Assistant United States Attorney and defense counsel and asked of this appellant alone approximately 266 questions, exclusive of those the plain purpose of which was clarification. When asking these questions the Court clearly expressed its disbelief of this appellant's veracity, but what is worse, it conducted the cross-examination thus relieving the prosecution of its legal burden. It assumed the role of a partisan and joined the hue and cry against all the accused (*U. S.* v. *Hunter*, 62 F. 2d 217, 220; *U. S.* v. *Marzano*, 149 F. 2d 923).

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The Court interrupted the direct examination of the defendant, Juliano, and began to cross-examine him on his competency in pipe-fitting, it having been testified to, that this defendant had purchased a small quantity of pipe and fittings and it having been previously adduced in evidence that when the still premises were raided, parts of the still had had pipe connections. The purpose was evidently to show that this defendant had purchased the pipe and fitted it on to the still. This was for the prosecution to do and not for the Court. It thus assumed once again the role of prosecutor (231 to 232).

Again the Court broke into the direct examination of Juliano and asked 34 consecutive questions all of which were designed as the most severe cross-examination (252 to 259).

The Court unwarrantedly held Juliano's counsel up to ridicule when he charged him with attempting "to contradict his own witness" (276). And again, the Court undertook without any warrant to criticize this attorney for his "dramatics" and instructed him "to stop those shenanigans" (289 to 290).

The Court once more interrupted the direct examination of Juliano, became once again the prosecutor and cross-examined him severely on the size of the still which he had maintained he didn't know existed in the barn (297 to 299). And shortly after, the Court resumed his interruption of the direct examination to cross-examine him about his not going into the barn (314 to 315). The Court also took it upon itself to cross-examine Juliano pointedly about a revolver he said he had left in his desk at the farmhouse (324).

Relieving the prosecution of its burden and becoming an out and out partisan, the Court interrupted the cross-examination of Juliano and proceeded to ask 19 consecutive questions on its own cross-examination. All these questions were for the obvious purpose of discrediting the wit-

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ness and this is well pointed up by the Court's gratuitous comment to the effect that the defendant impressed the Court as an alert young man (326 to 330). This statement coupled with the subsequent cross-examination of the Court was solely calculated to cast doubt on this witness' credibility and to apprise the jury that it was the Court's opinion that he could not be as credulous as was made to appear. The additional statement "Of course, the jury is to determine whether you are alert" (327) served only to accentuate the harm and prejudice.

Once again the Court interrupted the cross-examination by the prosecutor to embark on its own cross-examination and asked 44 consecutive questions, all designed to discredit the witness (332 to 339).

The Court became cross-examiner and "took over" from the prosecution; it severely interrogated this defendant asking 14 consecutive questions with regard to a statement (Govt.'s Exh. 63 for Iden.) which Juliano had refused to sign (348 to 351). And the Court pursued this tack when it cross-examined Juliano and asked 34 consecutive questions of him relative to a pair of telephones and wire (360 to 365). The Court continued the same severe cross-examination for the sole purpose of breaking down this witness, thereby once again relieving the prosecution, becoming a partisan and failing to observe the unswerving standard of impartially (366 to 369).

Even when the witness, Joan Jordan, took the stand, the Court could not refrain from its course of unwarranted interference with cross-examination and proceeded to ask 17 consecutive questions (389 to 391).

It will be observed that the Court "took over" for the prosecution and interrupted direct examination and cross-examination as the whim struck it, asked long series of questions for the obvious purpose of casting doubt on the veracity of the defendant, Juliano, and the defense witnesses. The Court was overzealous in this respect. Coun-

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sel were prevented from properly representing their respective clients because of the fear of injuring their clients' cause by objecting to the Court's advocacy and harassing interrogations which were repeated so often. On the other hand, the Court was most gentle in its treatment of the witnesses for the prosecution even when they gratuitously injected unresponsive matter calculated to cause grave prejudice to the accused.

Regarded separately and singly, these acts on the part of the trial judge may appear magnified, but their cumulative effect was such as to deprive the petitioners of the fair and impartial trial and due process of law guaranteed to them by the Fifth and Sixth Amendments to the United States Constitution (*United States* v. *Brandt* (C. A. 2), 196 F. 2d 653).

The majority opinion grudgingly admits that "The record does show that the judge took an active part in the examination of witnesses which seems to have been more extensive and less even tempered than is to be commended." However, it does not find that the trial judge was so partial and so much an advocate for the prosecution as to require a reversal. It cites the case of *United States* v. *Marzano*, (2 Cir.) 149 F. 2d 923. As pointed out in the dissenting opinion of FRANK, *C.J.*, the error in that case involved a different type of judicial misconduct, i.e., direct threats by the trial judge against a witness, but the principle of law there stated by Judge LEARNED HAND is none the less applicable to the facts in the instant case.

As is further pointed out in the dissenting opinion, the trial judge, by his inordinate participation in the examination and cross-examination of the defense witnesses at the trial, violated the principle of law stated in *Quercia* v. *United States*, 289 U. S. 466, 469. He patently disclosed by his manner of questioning the defense witnesses, his disbelief in their veracity. But when the judge did so, his disbelief was implied and not expressed, and was not coupled

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with the warning that this Court said in the *Quercia* case, must be given to a jury contemporaneously, to the effect that they must reach their own independent conclusion as to all matters of fact and especially with respect to the guilt or innocence of the accused.

In *Adler* v. *United States* (5 Cir.), 182 F. 464, 472, the Court said:

> "The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of defendant's witnesses we can readily see that if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption they may also disregard it.
>
> A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there

is a direct conflict between them and the court. If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so inevitable.

Counsel are expected to maintain an attitude of respect and deference toward the judge, and this attitude is maintained without difficulty when the judge confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case."

In *Hunter* v. *United States* (5 Cir.), 62 F. 2d 217, 220, it was held:

"The assignments of error based on the district judge's cross-examination of appellant, are, in our opinion, well taken. While the method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in *Adler* v. *United States*, 5th Cir. 182 F. 464 * * *. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial."

And in *Baker* v. *United States* (5 Cir.), 156 F. 2d 386, 389, it is stated:

> "Firmly committed, as we are, to the proposition that while it is the duty of a trial judge to conduct the trial with firmness, understanding and judgment, it is equally his duty to conduct it with patience, politeness, fairness and moderation and that he is not to dominate the trial or to do more than, as administrator of it, keep it within legal bounds * * *."

In *Williams* v. *United States* (9 Cir.), 93 F. 2d 685, the Court held:

> "The harm done when the trial judge departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial is not diminished because the judge so acts by reason of unrestrained zeal or through inadvertence and is unintentionally unfair.
>
> It is improper for the court to take away the examination of witnesses from counsel when they are conducting their cases in an able and lawyer-like manner and then conduct the examinations his own way."

It is respectfully contended that the trial judge in the instant case became a partisan for the prosecution and in a very large measure took over the duties of the prosecutor, which obviously was a biased and partial act of advocacy. A very apt statement of the proposition contended for by petitioners is to be found in *United States* v. *Billeci* (App. D. C.), 184 F. 2d 394, 403. There the Court said:

> "The public interest requires that persons who have committed crimes be convicted of them. But the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution, the attorney for the defense represents the

accused. The judge is a disinterested and objective participant in the proceeding. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge" (Judge Learned Hand in *United States* v. *Marzano*, 149 F. 2d 923, 926).

* * * * * *

"It is a serious thing for an appellate court to reverse convictions in criminal cases. But the controlling importance is that the law be followed. The rules of law applicable to the function of the judge in a criminal trial by a jury are well settled. No matter what the impulse may be to transgress or evade them under provocative circumstances they must be observed. This is basic, without exception and compulsory."

The record here amply indicates that the trial judge failed in this duty to the grave prejudice of the petitioners.

Since Juliano testified that he at no time had known or seen the petitioners, Giallo and Valenti, prior to their meeting in the courthouse when arraigned for pleading to the indictment which was on April 6, 1951, something like 15 months after the seizure of the still (5, 372 to 377), the continuous cross-examination by the Court of this petitioner for the sole and evident purpose of discrediting his testimony, the advocacy of the Court and the "taking over" of the prosecution by the Court, could only serve to reflect adversely on Giallo's and Valenti's interests (*Williams* v. *United States*, 93 F. 2d 685, at pp. 688, 689.)

The majority in the Court of Appeals significantly fails to make mention of the decision of its own Court in *United States* v. *Brandt* (C. A. 2), 196 F. 2d 653. In said case, the Court of Appeals for the Second Circuit held that activities of the trial judge, markedly similar to those here, constituted reversible error. As FRANK, *C.J.*, says in his dissenting opinion in referring to said case (*United States* v. *Brandt*, supra):

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> "There we said that the trial judge must remain impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. * * * In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled. Beyond this the court actively cross-examined several witnesses, notably the defendant Brandt himself, to a quite unusual extent. This interrupted the orderly presentation of evidence by the defense. But further the questioning appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses. In *Brandt's* case, the government, on the strength of *United States* v. *Aaron*, 190 F. (2d) 144 (C. A. 2), cited here by my colleagues, had argued that the charge had cured these defects. This Court replied: 'Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here. For the 900 questions asked by the court during this eight-day trial present far more examples of serious incidents. The cumulative effect of these we are unable to hold cured by the formal charge given.'"

At this point it is most appropriate to refer to the statement by JACKSON, *J.*, in *Krulewich* v. *United States*, 338 U. S. 716, 722, 723:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, see *Blumenthal* v. *United States*, 332 U. S. 535, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *B. & O. Railroad Co.*, 2nd Cir., 167 F. 2d 54."

In *Simon* v. *United States* (4 Cir.), 123 F. 2d 80, it appears that the Court questioned the witness "from time to time" in an effort to bring out the facts of the case and

the report of this case as said by FRANK, *C.J.*, "discloses no facts which furnish a yardstick for the judge's role in the instance case."

Likewise in *United States* v. *Aaron* (2 Cir.), 190 F. 2d 144, 147, in commenting upon the complaint that the trial judge had unduly participated in the questioning of witnesses and had assumed a prosecutor's role, the Court said:

> "Much of the fault found with him (the trial judge) concerns what did not occur within the presence of the jury."

Consequently, neither do the facts in said case furnish a proper measure for comparison with the conduct of the trial judge in the instant case.

The trial court's unwarranted criticism of defense counsel and its indiscretion in this regard was referred to by Judge A. N. HAND of the Court of Appeals for the Second Circuit in another case (*United States* v. *Minuse*, 114 F. 2d 36, 39), in the following manner:

> "The court exhibited unreasonable impatience with defendants' counsel and failed to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial. Furthermore, there plainly was no justification for the constant interference by the court with counsel in their attempt to examine their witnesses. It did not expedite matters for the judge to take over such a large proportion of the examination and imposed unmerited burdens."

Of course, as is pointed out in the dissenting opinion, "It is no excuse that government counsel lacked experience." As a matter of fact, the assistant district attorney, who is described so disparagingly by his superior in his brief in the Court of Appeals, as being inexperienced and "manifestly not a master of the art of cross-examination," was at all times during the trial attended and assisted by two other assistant United States attorneys of many years of trial experience, Messrs. Kaplan and Burchill.

While counsel is fully cognizant of the difficulty that presents itself in attempting to lay down a rule or to formulate a set of rules for the conduct of a trial judge during the course of a trial, it has been recognized that certain standards are necessary. For instance, a federal trial judge, this Court has said, in *Quercia* v. *United States*, 289 U. S. 466, 469, may not comment on the evidence, unless he advises the jury, at the same time, that they are in no way bound by his views in their determination of the guilt or innocence of the accused and that all matters of fact are submitted to them for their determination.

An overzealous trial judge by injudicious and unjudicial conduct, by injecting himself unduly into the trial, by unlimited participation in disruptive examination and cross-examination of the witnesses called and especially of the accused and their witnesses for the obvious purpose of casting doubt on their veracity and to accentuate whatever inconsistencies there may be therein, by subjecting counsel to harassment and sarcasm, commits seriously prejudicial acts of advocacy and joins the hue and cry against the accused. He thereby lends the great weight of his authority to the prosecution to the grave prejudice of an accused.

Such conduct on the part of a trial judge results in a subtle erosion of the constitutional guarantees afforded an accused by the Fifth and Sixth Amendments to the United States Constitution, of a fair and impartial trial and of due process of law. This is what occurred in the instant case.

As was said in *Bollenbach* v. *United States*, 326 U. S. 607, 612:

> "The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr* v. *U. S.*, 153 U. S. 614, 626, and jurors are ever watchful of the words which fall from him."

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See also, *United States* v. *Haupt*, 136 F. 2d 661, 671; *United States* v. *Levi*, 177 F. 2d 833, 837; *Virginian Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 405.

POINT II

It was an improvident exercise of discretion to deny the motion for a mistrial made on behalf of Giallo and Valenti.

The witness, Gianatasio, an agent of the Alcohol Tax Unit, with more than twenty years service in this capacity, deliberately set out to bring to the attention of the jury the fact *that he was known to Valenti* (143). When being interrogated on cross-examination as to where Bosco and Valenti had gone and after having indicated that it was to a restaurant, he added the gratuitous and unresponsive statement, *"Because I figured he might know me"* (143). The purpose of this statement was obviously to convey to the jury that he, an agent of the Alcohol Tax Unit, was known to Valenti, and this despite the unwitting use of the subjunctive mood.

It is true that when counsel for Valenti moved to strike this statement as gratuitous and voluntary, the Court did so, but it is significant that it curtly refused to admonish the witness (144). By such refusal it not only created the impression on the jury that what the witness had done was not improper but it served to encourage the witness to repeat the offense, as is evidenced by his deliberate injection of a further gratuitous, voluntary and most prejudicial observation as to the defendant, Giallo (147, 148):

> "Q. And when you seized the Plymouth black sedan from Mr. Giallo, he told you to all your questions, directly that he didn't know anything about it and had never been in West Shokan, is that right? A. That is right. *I also told him the reason I wasn't arresting him was because he was out on bail——*" (Emphasis supplied.)

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The only reason one can assign for this unresponsive, additional, gratuitous and most harmful observation is a preconceived, deliberate and purposeful attempt to bring to the attention of the jury the fact that he, an Alcohol Tax Unit agent was aware of the fact that Giallo was then at large on bail. Considering his capacity as an enforcement officer of the Alcohol Tax Unit, which had been brought to the jury's attention by the prosecution immediately this witness was sworn, this statement was most prejudicial and the jury could arrive at no other conclusion but that Giallo was then "out on bail" in connection with an offense or crime of which the witness was cognizant as a result of his official connection with the Alcohol Tax Unit, i. e., a similar crime to that for which Giallo was then on trial.

When counsel most respectfully and with the utmost deference and courtesy, informed the Court that he was going to move for a mistrial if any more voluntary statements were forthcoming from this witness (148), the Court instead of now admonishing the witness (which it had refused to do on the occasion of the first breach) (144), commenced to berate counsel for his manner of addressing the Court. By contrast, its manner of advising the witness to desist from similar statements was actually gentle (149).

But what stands out like the proverbial sore thumb is that after ordering this statement stricken from the record, the Court made the following rejoinder to counsel's motion for a mistrial (149, 159):

> "Mr. Chapman: I think for the record, I ought to move for a mistrial because the witness has twice volunteered statements not responsive to any questions, and serving to prejudice my client.
>
> The Court: I don't regard that as prejudicial.
>
> Mr. Chapman: Your Honor will overrule it?
>
> The Court: The jury will erase anything from their minds that I have stricken from the record.
>
> Mr. Chapman: That is a very, sometimes a very hard thing to do."

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The Court thereupon, without inquiring of counsel as to his acquiescence in the procedure, inquired of the jury whether the remarks of the witness, which it had already stated it considered *unprejudicial*, would in any way cause them not to give fair consideration to the "guilt or innocence of any of these defendants", determined that the jury had "indicated in the negative", and denied the motion (150, 151).

Thus the Court actually criticized counsel, whereas the criticism should have been visited on the witness. It further accentuated the prejudice in the remark of the witness by addressing the jury with respect to it.

With respect to this contention, the majority in the Court below takes the attitude that counsel for the petitioners Giallo and Valenti increased any likelihood of harm by making it appear of record that the petitioner, Giallo, was not arrested on the indictment in this case until March 29, 1951, after it was filed.

It is respectfully submitted that this criticism is unwarranted and counsel would have been remiss in his duty had he left the matter to the speculation of the jury. Since it is contended that these unresponsive, gratuitous and prejudicial remarks were preconceived, deliberate, and made with the purpose in mind of conveying to the jury that the petitioners had previously been in conflict with the law relative to alcohol taxes, it would have been the height of stupidity to permit the implication and in fact the express statement of the trial judge that they were *not* prejudicial (159) sought to be implanted in the jury's mind, to go unchallenged. Therefore, the statement that it was defense counsel who accentuated the likelihood of harm caused by the government's witness' statements is, it is respectfully submitted, without any fair basis in fact or law.

Lastly, there are, to be sure, cases which hold generally that prompt action by the Court in striking unresponsive,

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prejudicial but inadvertent remarks of a witness, dispels the harm done and is not cause for a mistrial (*United States* v. *Hilliard*, 121 F. 2d 992; *United States* v. *Hirsch*, 74 F. 2d 215; *United States* v. *Kushner*, 135 F. 2d 668, 674; *United States* v. *Curzio*, 179 F. 2d 380). But there is no case which holds that a bald statement by the Court that an unresponsive, gratuitous, voluntary and harmful (and the record shows that it was not inadvertent but deliberate) answer was not prejudicial, can be cured by the Court ordering it stricken and then pointedly inquiring of the jury whether it would be prejudiced. (See dissenting opinion in *United States* v. *Stoppelli*, 183 F. 2d 391).

CONCLUSION

The judgments of conviction should be reversed and a new trial ordered.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONINO VALENTI AND JOSEPH C. JULIANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. II, 247–253)[1] and dissenting (R. II, 253–259) opinions of the Court of Appeals are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1953 (R. II, 259–260). The

[1] "R. II" refers to the gray "Appendix to Appellee's Brief", which is Volume II of the record; "R. I" refers to the blue "Appendix to Appellants' Brief", which is Volume I of the record.

petition for a writ of certiorari was filed on September 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial judge's examination of witnesses and remarks deprived petitioners of a fair and impartial trial.

2. Whether the trial judge erred in denying petitioners' motion for a mistrial where a government witness on cross-examination volunteered unresponsive statements, after which the judge ordered them stricken out and instructed the jury to disregard them.

STATEMENT

Petitioners Giallo, Valenti, and Juliano were charged, along with others, in the first count of an indictment returned in the United States District Court for the Southern District of New York with a conspiracy to commit offenses against the United States in violation of certain liquor control statutes under Title 26, United States Code (R. I, 13–15). In the second count petitioner Juliano was charged, along with others, with possession of an unregistered still in violation of 26 U. S. C. 2810 (R. I, 15). The jury found all three petitioners guilty under count one, but was unable to agree on count two as to petitioner Juliano (R. I, 133, 134). Petitioners Giallo and

Valenti were sentenced to imprisonment for five years (R. I, 9–10), and petitioner Juliano was sentenced to imprisonment for 18 months under count one (R. I, 10). On appeals from the convictions (R. I, 164–167), the judgments were affirmed by the Court of Appeals, one judge dissenting (R. II, 260).

The evidence may be summarized as follows:

On February 15, 1950, treasury agents, armed with a search warrant, discovered a still on a farm owned by petitioner Juliano (R. II, 240–246).

Juliano had purchased the farm in 1946 but was unsuccessful in its operation and moved his family to New Berlin, New York, in September 1949 (R. II, 40–42, 45). According to Juliano's testimony, he being the only one of the petitioners who testified, during the first week of December, 1949 he returned to the farm and rented the barn and house for $65 per month to a stranger who gave him a card bearing the name "Giollanno Trucking" (R. II, 51–55). Juliano testified that on February 11, 1950 he returned to the farm to pick up some of his tools, met there a man named Frank and another man who could not speak English, and slept there that night. Juliano also stated that during the five months prior to that date he had returned to the farm four or five times to "pick up some of [his] belongings." (R. II, 46–49.)

Defendant Di Lorenzo, who was charged under

count one and pleaded not guilty but whose case was severed (R. II, 22), testified that in June 1949 he had a conversation at the Academy Wire Products Company in Pelham, New York, with petitioners Giallo and Valenti. Valenti told Di Lorenzo, a used car dealer, they wanted to buy a Ford truck to "carry a heavy load of sugar", and Di Lorenzo obtained the truck for them. (R. II, 2–5.) The man whom Giallo and Valenti presented as the person in whose name the truck was to be registered introduced himself as Giollanno, but was really the defendant Bosco (R. II, 5–6). In July 1949, and about six times thereafter, Di Lorenzo purchased from Giallo and Valenti untaxed alcohol which was delivered by defendant Schick in the same truck Di Lorenzo had procured (R. II, 8–9, 10–13, 28).

In September 1949 Bosco, introducing a partner as Giollanno, rented a garage from one Roschitsch for parking the truck at Kingston, New York (R. I, 67–71). Government agents had observed the truck on numerous occasions transporting sugar from New York City to Kingston, and making trips to Juliano's farm (R. I, 20–21). A search warrant was obtained on February 14, 1950, and on February 15 government agents seized property used in the operation of a still at the farm, and certain receipts in Juliano's desk and jacket for items which could be used at a still (R. II, 240–246; R. I, 21–22).

ARGUMENT

1. Petitioners complain (Pet. 9–22) that the trial judge revealed an attitude partial toward the Government and adverse to defense witnesses and counsel, and committed reversible error by reason of his cross-examination of witnesses and remarks during the trial.

A reading of the entire record, however, discloses that the judge with courtesy and patience sought to ferret out the truth by cross-examining both government and defense witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. The judge properly refused to sit back as a mere moderator or umpire presiding over a game of forensic skill. His questions were perhaps more numerous than they might have been if a more experienced counsel had tried the case for the Government. But neither the mere number of questions asked, nor the fact that the true situation as elicited by the inquiries turned out to be adverse to the defense rather than the prosecution, spelled improper, partial advocacy on the part of the judge. It is submitted that he acted within the bounds of permissible discretion in conducting the trial, and that no reversible error resulted. Cf. *Glasser* v. *United States*, 315 U. S. 60, 82; *United States* v. *Aaron*, 190 F. 2d 144, 146 (C. A. 2), certiorari denied *sub nom. Friedus* v.

United States, 342 U. S. 827; *United States* v. *Breen* 96 F. 2d 782, 784 (C. A. 2), certiorari denied, 304 U. S. 585; *Simon* v. *United States*, 123 F. 2d 80, 83 (C. A. 4), certiorari denied, 314 U. S. 694; *Todorow* v. *United States*, 173 F. 2d 439, 448 (C. A. 9), certiorari denied, 337 U. S. 925; *Griffin* v. *United States*, 164 F. 2d 903 (C. A. D. C.), certiorari denied, 333 U. S. 857.[2]

Particular criticism is directed against alleged partisan cross-examination of petitioner Juliano by the trial judge. While it is true that the result of some of this questioning was to cast doubt on Juliano's credibility, the questions were put in proper and fair form for the purpose of testing credibility for the benefit of both the jury and the judge. Some of the questioning complained of (R. I, 84–87, 99–100) had been previously covered in Juliano's direct examination (R. II, 51, 52–54, 80–81), and much of it (R. I, 105, 108, 120–122, 122–123) was on relatively inconsequential mat-

[2] The broad, basic principles outlined in the cases we have cited are in general accord with those cited by petitioners (see Pet. 5) as conflicting with the decision below. In this kind of situation each case must be decided upon its own particular facts, and petitioners' cited cases involve much more active participation by the trial judge than here. Moreover, in some of them other errors, such as improper instructions to the jury, were important additional factors in contributing to the reversals. *E. g.*, *Adler* v. *United States*, 182 Fed. 464, 473–474 (C. A. 5); *Hunter* v. *United States*, 62 F. 2d 217, 220 (C. A. 5); *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); *United States* v. *Brandt*, 196 F. 2d 653, 656–657 (C. A. 2).

ters. The judge told the jury that while Juliano impressed him as a rather alert young man, it was for them to determine this question (R. I, 109). The judge's impartial attitude, moreover, was shown by numerous rulings in favor of the defense during the course of Juliano's testimony (*e. g.*, R. II, 62, 70, 82, 83, 89–90, 95, 115, 155, 164, 165, 167).[3]

There is no merit to the contention that the judge's rulings served to "rehabilitate" the convict Di Lorenzo, who was a government witness. There was no undue restriction of his cross-examination when he was pressed to divulge all the circumstances of his admitted manslaughter conviction to show that the death involved occurred during the illegal operation of a still (R. II, 17–19). Since Di Lorenzo had already admitted connection with illegal liquor traffic both with petitioners and on other occasions (R. II, 1, 12, 16), it is difficult to perceive how the jury's knowledge of details of his prior bootlegging with others could have substantially affected his credibility as a witness. He had, moreover, admitted that the manslaughter conviction resulted from the operation of a still (R. II, 18), and since the circumstances of this prior conviction were collateral to the case, the judge acted within his discretion in limiting further inquiry.

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[3] Other parts of the record also disclose rulings by the judge favorable to, and assisting, the defense in the presentation of its case (R. I, 52, 55, 63, 69, 72).

On cross-examination Di Lorenzo denied that he was guilty of the conspiracy charges in the indictment. The judge then asked if the witness meant he had nothing to do with the operation of the still, but was just a customer. (R. II, 35–36.) The answer was in the affirmative, this being in effect a repetition of Di Lorenzo's previous testimony that his dealings with Giallo and Valenti were limited to selling them a truck and buying some alcohol. But the judge's question could hardly be said to rehabilitate Di Lorenzo, for the witness, in answering, repeated a prior admission of acts from which the jury could have inferred that he actually was an accomplice to the conspiracy whose evidence should be received with great caution (see R. I, 136), despite his protestations of innocence.

Neither can it be said that the challenged remarks by the judge to defense counsel, considered either separately or cumulatively, constituted reversible error. Some of the statements by the judge related to proper trial procedure, *e. g.*, that counsel should object to improper questions before, not after, they were answered (R. I, 19–20); that the judge, not counsel, should make rulings on evidence and instruct the witnesses (R. I, 25–26, 76); that if counsel in the future would ask questions in ill-advised form to draw undesirable answers, he would have to take the consequences (R. I, 58–59); and that counsel should not attempt to have his witness contradict

his own testimony (R. I, 92–93). Other mildly impatient remarks by the judge were induced in large measure by apparently impertinent and provocative tactics employed by defense counsel (R. I, 40–41, 97; see also R. II, 239).[4]

2. Petitioners Giallo and Valenti urge that their counsel's motion for a mistrial should have been granted by reason of voluntary, allegedly prejudicial testimony by the witness Gianatasio, an agent of the Alcoholic Tax Unit (Pet. 23–26). The contention, however, is without merit.

On cross-examination, after Gianatasio stated that petitioner Valenti was only about eight feet away when he went to a restaurant with Bosco, the witness volunteered the statement, "Because I figured he might know me." On motion of Valenti's counsel, the judge ordered this remark stricken out but he did not think it necessary to admonish the witness although requested to do so. (R. I, 48.) Clearly there was no error here, and the majority below thought the point did "not seem at all important" (R. II, 249). Cf. *Hagans* v. *United States*, 170 F. 2d 141, 142 (C. A. 5).

Later on cross-examination Gianatasio made the voluntary statement that he told petitioner Giallo that "the reason [he] wasn't arresting him was because he was out on bail——." The following then occurred (R. I, 50–51):

[4] It should be noted that the judge also rebuked government counsel for improper trial tactics. See, *e. g.*, R. II, 7; R. I, 119–120.

Mr. CHAPMAN. I am going to move for a mistrial if we have any more of the voluntary statements, your Honor.

The COURT. Mr. Chapman, don't address the Court that way.

Mr. CHAPMAN. No. I, naturally——

The COURT. Don't address the Court that way.

Mr. CHAPMAN. I wasn't addressing your Honor in any way, but you can understand my rancor.

The COURT. Mr. Ginanatasio——

The WITNESS. Yes, sir?

The COURT. —don't make any statements of that nature again.

Stricken from the record and the jury are instructed to disregard them and erase them from their minds.

Go ahead. Next question.

Mr. CHAPMAN. I think, for the record, I ought to move for a mistrial because the witness has twice volunteered statements not responsive to any questions, and serving to prejudice my client.

The COURT. I don't regard that as prejudicial.

Mr. CHAPMAN. Your Honor will overrule it?

The COURT. The jury will erase anything from their minds that I have stricken from the record.

Mr. CHAPMAN. That is a very, sometimes, a very hard thing to do.

The COURT. We will ask the jurors now,

Do any of you feel you cannot erase that from your mind, or any of you feel that that remark which I have ordered stricken from the record would prejudice you in any way in the fair consideration of the guilt or innocence of any of these defendants?

The jury have all indicated in the negative. Your motion is denied.

Mr. CHAPMAN. Exception.

By Mr. Chapman:

Q. As a matter of fact, Mr. Giallo and Mr. Valenti were not arrested in this case until some time in the spring of 1951, is that right? A. After the indictment was handed down.

Mr. CHAPMAN. Can you give us the date of that, Mr. Schaefer?

The COURT. March 29, 1951.

Mr. CHAPMAN. That is right.

This incident is a good illustration of the manner in which petitioners endeavor by exaggeration to build up a charge of prejudicial misconduct. The rebuke to counsel was no stronger than the rebuke to the witness. The judge acted promptly in directing the jury to disregard the remark. The ensuing colloquy was occasioned by counsel's attempt to make a big issue of a minor matter. It is, we submit, clear that the judge acted within his sound discretion in denying the motion for a mistrial after carefully instructing the jury to disregard the voluntary statement of the witness. Cf. *United States* v. *Kushner,* 135

F. 2d 668, 674 (C. A. 2), certiorari denied, 320 U. S. 212; *United States* v. *Salli*, 115 F. 2d 292, 294 (C. A. 2); *United States* v. *Curzio*, 179 F. 2d 380 (C. A. 3); *Hilliard* v. *United States*, 121 F. 2d 992, 998–999 (C. A. 4), certiorari denied, 314 U. S. 627; *Claunch* v. *United States*, 155 F. 2d 261, 263 (C. A. 5); *Cavness* v. *United States*, 187 F. 2d 719, 722 (C. A. 9), certiorari denied, 341 U. S. 951.

CONCLUSION

The trial was properly conducted by the judge, and no question is raised which merits further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONINO VALENTI AND JOSEPH C. JULIANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority opinion of the Court of Appeals (R. II, 247–253) [1] is reported at 206 F. 2d 207, and the dissenting opinion (R. II, 253–259) is reported at 206 F. 2d 211.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1953 (R. II, 259–260). The

[1] "R. II" refers to the gray "Appendix to Appellee's Brief", which is the second half of the printed transcript of the record; "R. I." refers to the blue "Appendix to Appellants' Brief," which is the first half of the printed transcript of the record. "Tr." refers to the complete typewritten transcript which is filed with the Clerk.

petition for a writ of certiorari was filed on September 16, 1953, and granted on November 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial judge's examination of witnesses and his directions to counsel deprived petitioners of a fair and impartial trial.

2. Whether unresponsive statements volunteered by a government witness on cross-examination which the court ordered stricken from the record were correctly held not to require the declaration of a mistrial.

STATEMENT

Petitioners Giallo, Valenti, and Juliano were charged, along with others, in the first count of an indictment returned in the United States District Court for the Southern District of New York with a conspiracy under 18 U. S. C. 371 to commit offenses against the United States in violation of certain liquor control statutes under Title 26, United States Code (R. I, 13–15). In the second count petitioner Juliano was charged, along with others, with possession of an unregistered still in violation of 26 U. S. C. 2810 (a), 53 Stat. 308 (R. I, 15). The jury found all three petitioners guilty under count one, but was unable to agree on count two as to petitioner Juliano (R. I, 133, 134). Petitioners Giallo and Valenti were

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sentenced to imprisonment for five years (R. I, 9–10), and petitioner Juliano was sentenced to imprisonment for 18 months under count one (R. I, 10).

On appeals from the convictions (R. I, 164–167), the judgments were affirmed by the Court of Appeals for the Second Circuit, one judge dissenting (R. II, 260). The majority opinion held, insofar as here pertinent, (1) that the court's discretion to participate in the examination of witnesses was exercised within permissible bounds (R. II, 249); and (2) that a motion for a mistrial, on the ground that a government witness twice volunteered unresponsive and allegedly prejudicial answers on cross-examination, which the court had ordered stricken, was properly overruled (R. II, 249–251). Judge Frank dissenting, was of the opinion that the trial judge's participation in the trial exceeded the limits of judicial discretion by reason of his partisan cross-examination of petitioner Juliano and other defense witnesses, and his unwarranted remarks to defense counsel (R. II, 253, 257).

The evidence may be summarized as follows:

On February 15, 1950, treasury agents, armed with a search warrant, discovered a still and various distillery equipment on a farm in West Shokan, New York, owned by petitioner Juliano (R. II, 240–246). In 1946 Juliano had purchased the 117-acre farm, which was encumbered

by a GI mortgage for $9,000 and consisted of a 7-room house, a barn, a triple garage and a tool shed (R. II, 40–41). After attempting unsuccessfully to operate the farm, Juliano moved his family to New Berlin, New York, in September 1949 (R. II, 42, 45, 170; R. I, 26–27). According to Juliano's testimony—he being the only one of the petitioners who testified—during the first week of December, 1949, he returned to the farm and without obtaining the lessee's street address or the names of any references, rented the barn and house for $65 per month to a total stranger, who gave him a card bearing the name "Giollanno Trucking" (R. II, 51–53, 55, 97). Juliano left $5,000 worth of equipment in the triple car garage (R. II, 57). The $65 monthly rental was paid on two occasions, once by the stranger renting the premises and once by another young man at the house (R. II, 54–55; R. I, 27, 28).

A few days before Christmas 1949 Juliano returned for an overnight trip to the farm to find two other men, one of whom was named Jack and said he was the son of the man who rented the farm (R. II, 65, 98–99, 106–107). Juliano testified that on February 11, 1950, he returned to the farm to pick up some of his tools, met a man named Frank and another who could not speak English, and slept there that night. Juliano stated that during the five months prior to that date he had returned to the farm four or five

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times to "pick up some of [his] belongings." (R. II, 46–49.) Although Juliano testified that he did not ask the men at the time what their business was, he ate meals with them and on one occasion bought a telephone and its necessary equipment for them (R. II, 107, 110, 126, 143–144, 151–153).

Defendant DiLorenzo, who was charged under count one and pleaded not guilty but whose case was severed (R. II, 22), testified that in June 1949 he had a conversation at the Academy Wire Products Company in Pelham, New York, with petitioners Giallo and Valenti, the proprietors of that business. Valenti informed DiLorenzo, a used car dealer, that they wanted to buy a Ford F–8 truck to "carry a heavy load of sugar" and for the "illegal purpose of alcohol and sugar." Following instructions, DiLorenzo obtained such a truck. (R. II, 1, 2–5, 25–26, 36.) The man whom Giallo and Valenti presented as the person in whose name the truck was to be registered introduced himself as Giollanno, but was really the defendant Bosco (R. II, 5–6, 10). In July 1949, and about six times thereafter, DiLorenzo purchased from Giallo and Valenti untaxed alcohol in quantities of as much as 300 gallons. The alcohol was delivered by defendant Schick for a DiLorenzo customer in Connecticut in the same truck DiLorenzo had procured for Giallo and Valenti. (R. II, 8–9, 10–13, 15, 28.)

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In September 1949 Bosco, introducing a partner as Giollanno, rented a garage from one Roschitsch for parking the truck at Kingston, New York (R. I, 67–71). Government agents on several occasions during January and February 1950 had observed the truck transporting heavy loads of sugar from New York City to the vicinity of Kingston and to Juliano's farm (R. I, 20–21, 149; R. II, 243–244). A search warrant was obtained on February 14, 1950, and on February 15 government agents seized property used in the operation of a still at the farm, and certain receipts, found in Juliano's desk and in a Navy type jacket, for items which could be used in a still (R. II, 240–246; R. I, 21–22).

Juliano testified that on February 16, 1950, when he was on his way to the farm, some neighbors advised him not to go there, since there was trouble with "State Troopers, Federal investigators, and the biggest distillery you ever saw." Juliano became panicky and returned about 100 miles to his home at New Berlin. (R. II, 80–82, 147–148.) A state trooper advised Juliano to return to the farm at West Shokan, and on February 17 he did so. He was later arrested and questioned by the authorities at Newburgh, New York. (R. II, 82–86, 94–95.) Petitioners Giallo and Valenti were arrested after the return of the indictment on March 29, 1951 (R. I, 51).

SUMMARY OF ARGUMENT

I

Petitioners were not deprived of a fair and impartial trial in violation of the Sixth Amendment. Their contention that the trial judge revealed an attitude partial toward the Government and adverse to defense witnesses and counsel, and committed reversible error by reason of his partisan examination of witnesses and his directions to counsel, is without merit.

A federal judge in a jury trial is not a moderator who presides, rules on the admissibility of evidence, and submits questions to the jury for determination. For the purpose of eliciting the truth and a full disclosure of all material facts the judge has the right to interrogate witnesses, and the extent of this interrogation is a matter within his sound discretion. Even if a large number of questions are asked by the judge, this alone does not constitute error. The alleged partisanship of the judge must be examined in the light of the setting of the entire record.

A reading of the entire record, including the typewritten transcript, discloses that the judge with considerable patience sought to ferret out the truth by examining both government and defense witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. Neither the number of questions asked, nor the fact that the responses

to the inquiries turned out to be adverse to the defense rather than the prosecution, demonstrated improper, partial advocacy on the part of the judge. He acted well within the bounds of permissible discretion in conducting the trial, and no reversible error resulted.

A. Even though the answers to some of the judge's questions of petitioner Juliano cast doubt on Juliano's credibility, almost any questioning by a judge may incidentally have that effect if the witness's answers appear to be false, as was true of Juliano's testimony. Unless one assumes the court and jury both knew the answers to the questions before they were asked, an entirely unwarranted assumption, it appears that the purpose and effect was to arrive at the truth rather than to make the court's views known to the jury. The judge evinced an impartial attitude in making numerous rulings in favor of the defense during the course of Juliano's testimony, and properly left the question of his credibility for determination of the jury alone.

B. It is complained that when defense counsel attempted to impeach the government witness DiLorenzo on the basis of his criminal record, the judge interfered to rehabilitate him. However, it was not an undue interference with cross-examination to restrict defense counsel when he attempted to bring out all the circumstances of the witness's admitted manslaughter conviction to show that the death of two children occurred

during the illegal operation of a still. Since the witness admitted that the manslaughter conviction resulted from the operation of a still and the circumstances of this prior conviction were collateral to the case, the judge acted within his sound discretion in limiting further cross-examination.

When the judge asked DiLorenzo, after he had denied guilt of the conspiracy charges, if he meant that he had nothing to do with the operation of the still but was just a customer, and the witness answered in the affirmative, this merely clarified his position. He was in effect repeating his previous testimony that his dealings with petitioners Giallo and Valenti were limited to selling them a truck and buying some alcohol, from which the jury could have inferred that he was an accomplice to the conspiracy whose evidence should be received with great caution, despite his protestations of innocence.

C. In instances where the judge examined other witnesses he did not show prejudicial partisanship for the Government. Some of these incidents involved inconsequential and immaterial matters, and some were concerned with parties other than the petitioners. In other instances the judge asked questions in impartial and proper form for the purpose of eliciting the complete truth.

D. Some of the challenged remarks by the judge to defense counsel were unobjectionable statements as to the proper trial procedure which

the judge intended to require, e. g., that counsel should object to improper questions before, not after, they were answered; and that the judge, not counsel, should make rulings on evidence and instruct the witnesses. None indicated a position of hostility which could have influenced the jury in its verdict.

II

There is no merit to the contention by petitioners Giallo and Valenti that a mistrial should have been granted by reason of voluntary, allegedly prejudicial testimony by the government witness Ginanatasio, an agent of the Alcoholic Tax Unit, on two occasions. In the first incident on cross-examination Ginanatasio volunteered the statement that he figured Valenti might know him. On objection the judge ordered this remark stricken out, but did not think it necessary to admonish the witness although requested to do so. No motion for a mistrial was made and the cross-examination continued. Clearly, there was no error here, and the majority below thought the point did "not seem at all important."

In the second incident, later in his cross-examination, Ginanatasio volunteered the statement that he told Giallo that he "wasn't arresting him [Giallo] because he was out on bail." Giallo's counsel moved for a mistrial on the ground that the witness had twice volunteered nonresponsive statements. In the first place, the

fact that Giallo was out on bail was innocuous. If counsel had not built up the incident, it probably would have carried no weight. When objection was pressed, the court took every precaution short of declaring a mistrial to prevent prejudice to the petitioner.

In the federal courts the question of discharging a jury before verdict or granting a mistrial is a matter resting within the sound discretion of the trial judge, and the burden is upon the accused moving for a mistrial to show the reasonable possibility of prejudice and that the trial judge's discretion has been abused. Petitioners did not sustain that burden, and the judge acted within his sound discretion in denying the motion for a mistrial after carefully instructing the jury to disregard the voluntary statements of the witness.

ARGUMENT

I

THE TRIAL JUDGE'S EXAMINATION OF WITNESSES AND HIS DIRECTIONS TO COUNSEL DID NOT DEPRIVE PETITIONERS OF A FAIR AND IMPARTIAL TRIAL

Petitioners contend that they were deprived of a fair and impartial trial in violation of the Fifth and Sixth Amendments, in that the trial judge revealed an attitude partial toward the Government and adverse to defense witnesses and counsel, and committed reversible error by reason of his partisan examination of witnesses and his remarks during the trial (Br. 8).

The legal principles applicable to this type of situation are well settled. This Court has made it clear that a federal judge in a jury trial "is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all these matters in a trial not capable of record * * *." *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660; *Quercia* v. *United States*, 289 U. S. 466, 469. For the purpose of eliciting the truth and a full disclosure of all material facts the judge has the right to interrogate both parties and witnesses, and the extent of this interrogation is a matter within his sound discretion. *Glasser* v. *United States*, 315 U. S. 60, 82; *United States* v. *Gross*, 103 F. 2d 11, 13 (C. A. 7); *United States* v. *Kay*, 101 F. 2d 270, 272 (C. A. 2), certiorari denied, 306 U. S. 660. The general rule is aptly stated in *Simon* v. *United States*, 123 F. 2d 80, 83 (C. A. 4), certiorari denied, 314 U. S. 694:

> Appellant's counsel strenuously complains that the trial judge questioned the witnesses from time to time in an effort to bring out the facts of the case. This is precisely what he should have done. It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a

> town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other.

And in *United States* v. *Aaron,* 190 F. 2d 144, 146 (C. A. 2), certiorari denied, *sub nom. Freidus* v. *United States,* 342 U. S. 827, the court observed that the trial judge has:

> * * * the right, indeed the duty, in the exercise of a wise and just discretion * * * to act in the interrogation of witnesses and otherwise to the end that trials will not be mere contests in forensic skill between opposing attorneys, but that the truth shall emerge so far as possible and be given its full legal significance in the judgment. * * *

In *Billeci* v. *United States,* 184 F. 2d 394, 402–3 (C. A. D. C.) the principles were well restated as follows:

> A federal trial judge in a criminal case is not an inert figure. He is not a mere moderator. Besides his own exclusive functions of conducting the trial and declaring the applicable law, he may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid,

> through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In exceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused.

Even if a large number of questions are asked by the judge, this alone does not constitute error. *United States* v. *Aaron, supra,* 190 F. 2d at 146; and see the concession by dissenting Judge Frank below: "I do not feel that the quantum of questioning by the court serves alone as an index of the propriety of his participation" (R. II, 255). The alleged partisanship of the judge, moreover, must be examined, not by considering separate incidents alone, but in the light of the setting of the entire record. Cf. *Todorow* v. *United States,* 173 F. 2d 439, 448 (C. A. 9), certiorari denied, 337 U. S. 925: "Clearly, no one incident is sufficient

to warrant reversal, and to determine whether, in the aggregate, they adversely affected the substantial rights of the appellants, it is necessary to consider them in their natural and proper setting, namely, the *entire record.*" (Italics ours.) And "separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve. * * * nothing conduces less to [insuring an impartial conduct of the trial] than an over jealous scrutiny of every word that may fall from a judge's mouth." *United States* v. *Warren*, 120 F. 2d 211, 212 (C. A. 2). See also the admonition by this Court in *Glasser* v. *United States, supra,* 315 U. S. at 83, for guarding against the "magnification on appeal of instances which were of little importance in their setting."

It is significant that petitioners did not make objection at the trial to the judge's allegedly too extended and partisan examination of the various witnesses, as to which complaint is now made.[2] If counsel had thought the judge's interrogations of the witnesses were becoming too lengthy and partisan in nature, they could have objected at the bench outside of the hearing of the jury at some stage of the trial to make their general position

[2] An examination of the proceedings at the close of the trial indicates that defense counsel did not commence to smart at their treatment by the judge until later when they undertook the preparation of their appellate briefs (Tr. 828–832).

clear.[3] Instead they apparently did not consider the judge's participation objectionable and chose to speculate on a possible acquittal. Having been unsuccessful in this hope, they should not now be permitted to attack the propriety of the judge's participation in the trial. Cf. *United States* v. *Breen*, 96 F. 2d 782, 784 (C. A. 2), certiorari denied, 304 U. S. 585: "All too often, it seems, appellants like these become overcritical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause."

A reading of the entire record, including the typewritten transcript lodged with the clerk, dis-

[3] Despite the dictum in *Williams* v. *United States*, 93 F. 2d 685, 690 (C. A. 9), that "counsel are not held to strict accountability for failure to object or except when the questions are asked by the court," the weight of authority holds that in the absence of objection, allegedly improper statements and questions by the trial court are not reviewable on appeal. As was said in *Troutman* v. *United States*, 100 F. 2d 628, 634 (C. A. 10): "It has been repeatedly held that ordinarily alleged errors taking place during the trial of a criminal case must be called to the attention of the court and thus afford an opportunity to correct them. It was essential to the review of these questions that they be presented to the trial court in some manner." See also *Buie* v. *United States*, 76 F. 2d 848, 849 (C. A. 5), certiorari denied, 296 U. S. 585, rehearing denied, 296 U. S. 662; *Mendelson* v. *United States*, 58 F. 2d 532, 534 (C. A. D. C.); *Heinze* v. *United States*, 181 Fed. 322, 325 (C. A. 2); *Burnstein* v. *United States*, 55 F. 2d 599 (C. A. 9), certiorari denied, 286 U. S. 550; *Callahan* v. *United States*, 35 F. 2d 633, 634 (C. A. 10); *Cusmano* v. *United States*, 13 F. 2d 451, 453 (C. A. 6), certiorari denied, 273 U. S. 773; *Baldwin* v. *United States*, 72 F. 2d 810, 812 (C. A. 9), certiorari denied, 295 U. S. 761.

closes that the judge sought to ferret out the truth by examining both government and defense witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. The judge properly refused to sit back as a mere moderator or umpire presiding over a game of forensic skill between opposing advocates. His questions were numerous, but neither the mere number of questions asked, nor the fact that the true situation as elicited by the inquiries turned out to be adverse to the defense rather than the prosecution, spelled improper, partial advocacy on the part of the judge. It is the Government's position that he acted well within the bounds of permissible discretion in conducting the trial, and that no reversible error resulted. Cf. *Glasser* v. *United States, supra,* 315 U. S. at 82; *United States* v. *Aaron, supra,* 190 F. 2d at 146; *United States* v. *Breen, supra,* 96 F. 2d at 784; *Pariser* v. *City of New York,* 146 F. 2d 431, 433 (C. A. 2); *United States* v. *Amorosa,* 167 F. 2d 597, 600 (C. A. 3); *Simon* v. *United States, supra,* 123 F. 2d at 83; *Moore* v. *United States,* 132 F. 2d 47 (C. A. 5), certiorari denied, 318 U. S. 784; *Texas Pacific-Missouri Pacific Term. R.* v. *Welsh,* 179 F. 2d 880, 881–882 (C. A. 5); *Cusmano* v. *United States, supra,* 13 F. 2d at 452–453; *United States* v. *Lee,* 107 F. 2d 522, 528–530 (C. A. 7), certiorari denied, 309 U. S. 659; *United States* v. *Domres,* 142 F. 2d 477, 479 (C. A. 7), certiorari denied, 323 U. S. 723; *Kirk* v. *United States,* 280

Fed. 506, 507 (C. A. 8); *Hargrove* v. *United States*, 25 F. 2d 258, 259 (C. A. 8); *Todorow* v. *United States, supra*, 173 F. 2d at 448; *Ochoa* v. *United States*, 167 F. 2d 341, 344 (C. A. 9); *Fritts* v. *United States*, 80 F. 2d 644, 646 (C. A. 10); *Callahan* v. *United States, supra*, 35 F. 2d at 634; *Griffin* v. *United States*, 164 F. 2d 903 (C. A. D. C.), certiorari denied, 333 U. S. 857; *People* v. *Knapper*, 245 N. Y. S. 245, 247–248. See also annotation at 84 A. L. R. 1172; Wigmore on *Evidence*, 3rd Ed., § 784.[4] Petitioners have read hostility into action which was designed merely to clarify. The record as a whole shows straightforward, pointed but unloaded, questioning by the judge. That is not improper conduct.

The challenged incidents of alleged improprieties on the part of the trial judge fall within the following general categories: (A) examination of petitioner Juliano; (B) rulings on testi-

[4] The basic principles outlined in the cases we have cited are in general accord with those cited by petitioners (see Br. 15–23). In fact, it is probable that both majority and dissent in the court below, counsel for petitioners and counsel for the government, would all state the legal principles in nearly identical terms. In this kind of situation each case must be decided upon its own particular facts. However, it should be noted that in some of the cases cited by petitioners other errors, such as improper instructions to the jury, were important additional factors in contributing to the reversals. E. g., *Adler* v. *United States*, 182 F. 2d 464, 473–474 (C. A. 5); *Hunter* v. *United States*, 62 F. 2d 217, 220 (C. A. 5); *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); *United States* v. *Brandt*, 196 F. 2d 653, 656–657 (C. A. 2).

mony of government witness DiLorenzo; (C) examination of other witnesses; and (D) remarks to petitioners' counsel. We examine these in more detail, although nothing but a complete reading of the record can really be decisive on this issue.

(A) *Examination of petitioner Juliano.* Particular criticism is directed against alleged partisan examination of petitioner Juliano by the trial judge. The latter half of the record, which was the government's appendix in the court below, contains the entire testimony of Juliano (R. II, 36–172). When the judge's questions are considered in the full context of that testimony as against the condensed version presented by selective excerpts in petitioners' appendix (R. I, 76–129), it becomes readily apparent that he did not exceed the bounds of judicial propriety.

Essentially petitioners' complaints of the type of questioning are illustrated by a series of questions which appear at pages 55–57 of Volume II. Juliano had testified that, after he had abandoned his farm around Labor Day of 1949 and had put it up for sale, he came back during the first week in December to collect some tools. As he was about to leave the farm, a man came up, asked to rent the farm, and Juliano agreed to give him immediate occupancy of the house and barn at $65 per month (R. II, 50–55). Then the court asked a number of questions such as whether Juliano had ever met the man before, whether he

inquired about the man's business, whether he obtained references, etc. (R. II, 55–57). No doubt the answers, which were to the effect that Juliano had rented the dwelling and barn to an absolute stranger without obtaining his address or references, although he had $5,000 worth of equipment under padlock in a garage on the premises, did not serve to make Juliano a very credible witness. The fault lies, however, not in the questions, but in the inherent incredibility of the answers. The questions themselves were not partisan in character. If the answers had been different they would have done as much to support petitioners' case as they did to harm it.

The same sort of questioning occurred later. Juliano had testified that he had bought a set of telephones for a young fellow he found in the farm house when he visited there after he had rented it (R. II, 64). The judge asked whether this person was the same man to whom Juliano had rented the farm, and when the answer was in the negative, asked about the extent of Juliano's equity in the farm (R. II, 65–66). Later, when Juliano testified that on the day of the raid, he had turned back while on the way to the farm because neighbors told him investigators were there and "the biggest distillery you ever saw" (R. II, 80), the court said:

> You mean after you heard that the Federal agents were in possession of your farm

and that a still had been found there? [R. II, 81.]

The court continued the questioning after Juliano then said that "they didn't say any still, but they said there was trouble up there" (R. II, 81).

Similarly, on cross-examination, the questioning by the court, the most extensive of which appears at R. II, 106–110, elicited testimony by Juliano that on one of his visits to the farm after renting it, he asked the men if they worked around there, and they replied that they would have to get some sleep since they were supposed to ride the next day; that he did not ask what or for whom they were riding; that he ate meals with the men on his several visits to the farm; that each time he saw the men they were just playing the radio or lounging around; and that he detected nothing unusual around the premises (R. II, 106–110).[5] Although this questioning probably adversely affected Juliano's credibility, that result followed primarily from the inherent weakness of his replies, and not from the questioning which was designed to elicit the true facts. The questions were in proper and fair form, and the mere fact that the answers tended to favor the prosecution rather than the defense did not make the examination improper. The judge properly left to the jury the determination of Juliano's credibility when he said, "You impress

[5] See also R. II, 99–100, 125–126, 143–145, 151–152.

me as being a rather alert young man. Of course, the jury is to determine whether you are alert" (R. II, 106).*

It is, of course, impossible in the space of a brief to set forth the pages, far more numerous than the ones which are the subject of criticism, in which there were no interruptions by the court. Moreover, it becomes apparent from a reading of the record that many of the questions by the judge, both during direct and cross-examination, were designed either to clarify some point which had been left dangling (E. g. R. II, 39, 40, 52, 63, 76, 111–112, 117, 146) or to explain a matter to the witness (E. g. R. II, 48, 58, 96, 101, 118). The judge's attitude, moreover, was demonstrated by numerous rulings in favor of the defense during the course of Juliano's testimony. For example, even though the government attorney moved to strike out Juliano's self-serving statement of the conclusion that he "didn't think much of [the police] for tearing the place apart" in their search, the judge impartially refused to do so (R. II, 89–90). See also R. II, 62, 70, 82, 83, 95, 164, 165 and 167 for instances where the judge overruled objections by government coun-

* In his final charge to the jury the judge instructed: "You are the sole and exclusive judges of the credibility of each and every witness, as you are of the facts. You are the exclusive judges of the trustworthiness of the witnesses who have taken the stand" (App., p. 38).

sel; and R. II, 115, 134 and 155 for the sustaining of objections by defense counsel.[7]

It is significant that the jury was unable to agree as to Juliano's guilt under count two, the count dealing with possession, with respect to which much of the court's questioning was concerned.

(B) *Rulings on testimony of government witness DiLorenzo.* There is no merit to the contention that the judge's rulings served to rehabilitate the convict DiLorenzo, who was a government witness (Br. 10). It was not error to restrict the cross-examination by defense counsel when he attempted to develop all the circumstances of the witness's admitted manslaughter conviction to show that the death of two children occurred during the illegal operation of a still (R. II, 17–19). Since DiLorenzo had already admitted connection with illegal liquor traffic both with petitioners and on other occasions (R. II, 1, 12, 16), it is difficult to perceive how the jury's knowledge of details of his prior bootlegging with others could have substantially

[7] Other parts of the record also disclose rulings by the judge favorable to, and assisting petitioners, in the presentation of their defense. E. g., R. II, 43, where the judge, in discussing the materiality of certain evidence with counsel for Juliano, who admitted the evidence was "[N]ot too material," ruled, "If it is even slightly material, go ahead with it." See also R. II, 6, 7, 22, 26, 27, 29, 35, 66, 77–78, 162; R. I, 36, 52, 55, 63, 69, 72, 162.

affected his credibility as a witness. He had, moreover, admitted that the manslaughter conviction resulted from the operation of a still (R. II, 18), and since the circumstances of this prior conviction were collateral to the case, the judge acted within his sound discretion in limiting further cross-examination. Cf. *Lee Kwong Nom* v. *United States,* 20 F. 2d 470, 472 (C. A. 2), holding that where an accused had admitted a conviction for bribery and serving a penitentiary sentence, further inquiry as to the length of his sentence was properly excluded, since he had been "sufficiently impeached, and his credibility attacked, by the question and answer which brought forth the admission of his conviction." See also *Coulston* v. *United States,* 51 F. 2d 178, 182 (C. A. 10).

On cross-examination DiLorenzo denied that he was guilty of the conspiracy charges in the indictment. The judge then asked if the witness meant he had nothing to do with the operation of the still, but was just a customer. (R. II, 35–36.) The answer was in the affirmative, this being in effect a repetition of DiLorenzo's previous testimony that his dealings with Giallo and Valenti were limited to selling them a truck and buying some alcohol. But the judge's question could hardly be characterized as rehabilitating DiLorenzo, for the witness, in answering, repeated a prior admission of acts from which the jury could have inferred that he actually was an accomplice

to the conspiracy whose evidence should be received with great caution,[8] despite his protestations of innocence.

Complaint is made as to the judge's questioning DiLorenzo during his direct examination about the purpose for which the truck he was to procure for petitioners Giallo and Valenti was to be used (R. I, 42–43). This was done, however, only after the witness had testified that in the conversation with Giallo and Valenti they told him "the type of truck they wanted, and for what they wanted it for" (R. I, 42). Defense counsel had then interrupted to state, "I would like the conversation without any suggestions, your Honor, if there is any." The judge, without being suggestive, asked the details of the conversation and the answer was that the truck was to be used to carry sugar and alcohol (R. I, 42, 43).

(C) *Examination of other witnesses.* Petitioner complains of other instances where it is contended that the judge erred in interrupting the trial and examining witnesses. In none of these were any substantial rights of the petitioners

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[8] See R. I, 136:

"The COURT. I instructed them specifically with reference to DiLorenzo's testimony.

"Mr. CHAPMAN. With respect to the accomplice——

"The COURT. To scrutinize it very carefully."

The exact language used in the court's charge was: "I charge you that you must weigh and examine very carefully the testimony of DiLorenzo, and that you must do so in the light of his admissions of his wrongdoing" (App., p. 39).

prejudiced. Some of these incidents involved inconsequential and immaterial matters, and others were concerned with parties other than the petitioners. This observation applies to the testimony by government witness White describing the desk from which certain of Juliano's papers were taken by government agents (R. I, 31–33); testimony by government witness Andersen that he recognized defendant Schifano as the man he saw on a parking lot on February 9, 1950 (R. I, 56); testimony by government witness Greenberg that he identified a picture of defendant Schifano (R. I, 59); testimony by government witness Peterkin that he could not recall the days he was absent from work because of sickness (R. I, 60–61); testimony by government witness Bartsch as to whether he understood a question addressed by counsel, and that he had not testified before the grand jury (R. I, 72–73); and testimony by defense witness Jordan as to the day of the week on which she had a party on February 9, 1951 (R. I, 130–131).

There was nothing improper in the questioning of government witness Carroll as to how the truck observed by the agents circled around certain streets, and how it traveled on main thoroughfares in Kingston (R. I, 17–19). This elicited a complete picture of what occurred, and petitioners were eager in any event to show that the truck traveled on main roads rather than surrepti-

tiously.[9] The judge's observation, after government counsel's motion to strike out the word "illicit" from the witness' answer describing the seized distillery, that it was not necessary for him to move if the defendants "don't move" (R. I, 18), was nonprejudicial. The witness corrected his answer to omit the adjective and in any event, there was no serious contention that the distillery was not an illegal one.

(D) *Remarks to petitioners' counsel.* The challenged remarks by the judge to defense counsel, considered either separately or cumulatively, did not constitute reversible error.[10] Some of them were unobjectionable statements by the judge as to proper trial procedure which he intended to prevail. This was true of his admonitions that counsel should object to improper questions before, not after, they were answered (R. I, 19–20); that the judge, not counsel, should make rulings on evidence and instruct the witnesses (R. I, 25–26, 76); that if counsel in the future would ask questions in ill-advised form to evoke

[9] Other questioning complained of similarly was nonsuggestive straight-forward questioning to elicit material facts (R. I, 65–71, 73–75).

[10] In this respect the statement made by Mr. Justice Frankfurter in his dissent in *Glasser* v. *United States*, 315 U. S. 60, 88, is pertinent:

"It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

undesirable answers, he would have to take the consequences (R. I, 58–59); and that counsel should not attempt to have his witness contradict his own testimony (R. I, 92–93).[11]

Other mildly impatient remarks by the judge were innocuous. When the judge reminded counsel that he was the one who should make the ruling as to what answers of government witness Lane would be binding only on petitioner Juliano individually, and with a dash of humor thanked counsel for his guidance, it was counsel who interjected the word "sarcastic" into the colloquy (R. I, 25–26). In another incident it was defense counsel who improperly suggested that his cross-examination was being "telescoped" and we think the judge was correct in interpreting this as "rather presumptuous" (R. I, 40–41). There obviously was no prejudice when the judge, thinking that counsel had a pocket knife in his hand, merely asked him to put it away (R. I, 56).[12]

[11] It should be noted that the judge also impartially rebuked government counsel for improper trial tactics. For example, in the cross-examination of petitioner Juliano by government counsel the following occurred (R. II, 138):

"Q. Major Lane's testimony the other day. A. Yes.

Q. And you heard him testify to what——A. Yes.

Q. (Continuing.) You had told him.

The COURT. That is not proper, Mr. Frank."

See also R. II, 7.

[12] It is difficult to comprehend why both petitioner (Br. 11) and the dissenting judge (R. II, 258) refer to this incident. It may be that the very word "knife" is emphasized because of its sinister connotation.

And when counsel apparently was disturbing the trial in leafing through a notebook which he had had for some time the judge's admonition to stop the shenanigans can hardly be deemed hostile (R. I, 96–97).[13] Nor is it a sign of prejudice that when counsel started saying "I can't take the Government's word" (the tone of which obviously cannot be reflected in the record), the court said, "None of these dramatics" (R. I, 97).

In another incident defense counsel complained of an alleged critical remark by the judge as to counsel's right of cross-examination (R. I, 54–55). This passage shows, however, that even apart from the judge's power to limit the scope of cross-examination in the exercise of his sound discretion, there was no actual limitation. No prejudice resulted since the judge asked counsel if he wanted to continue further cross-examination, to which counsel answered in the negative.[14]

The complaint as to hostility to counsel is clearly an attempt to magnify minor incidents far

[13] For other impertinent and provocative tactics employed by defense counsel, which apparently explain the judge's moderate impatience at sporadic instances during the trial, see R. II, 71–72, 79–80, 123–124, 239.

[14] The judge in his charge to the jury made it clear that they were to disregard any statements he had made to counsel: "The Court instructs you, finally, to disregard any statements that it may have made to counsel during the trial, statements that might seem to you to indicate that the Court has any opinion on the evidence in the case, or might in any way reflect upon the conduct of counsel during the trial" (App., p. 39).

beyond their significance in the course of the trial.

Essentially, the complaint in this case is that the trial judge asked too many pertinent questions. There can be no valid complaint of the questions themselves, which were straightforward, objective and relevant. The real objection is that they were, from petitioners' point of view, too relevant. Thus, in essence, the trial judge is accused of having a more incisive mind, and a better technique in phrasing questions, than counsel for either the prosecution or the defense. It does not, we submit, further the cause of criminal justice to have a well-merited conviction reversed because the trial judge used his ability to get the facts before the jury.

II

CERTAIN VOLUNTARY, NON-RESPONSIVE ANSWERS BY A GOVERNMENT WITNESS ON CROSS-EXAMINATION, WHICH THE COURT ORDERED STRICKEN FROM THE RECORD, WERE CORRECTLY HELD NOT TO REQUIRE THE DECLARATION OF A MISTRIAL

There is no merit to the contention by petitioners Giallo and Valenti that their counsel's motion for a mistrial should have been granted by reason of voluntary, allegedly prejudicial testimony by the government witness Ginanatasio, an agent of the Alcoholic Tax Unit (Br. 23). In both instances involved, the judge made it absolutely clear to the jury that they should disre-

gard the objectionable evidence. The jury presumably respected the judge's instructions and returned a verdict based only on legal evidence. Cf. *Pennsylvania Co. V. Roy,* 102 U. S. 451, 459; *Turner* v. *American Security & Trust Co.,* 213 U. S. 257, 267; *Hopt* v. *Utah,* 120 U. S. 430, 438.

In the first incident, on cross-examination, after Ginanatasio stated that petitioner Valenti was only about eight feet away when he went to a restaurant with Bosco, the witness volunteered the statement, "Because I figured he might know me." On motion of Valenti's counsel, the judge ordered this remark stricken out, but did not think it necessary to admonish the witness although requested to do so. (R. I, 48.) His objection having been sustained, counsel evidently did not consider the incident of great moment, for he immediately continued his cross-examination and did not move for a mistrial. The volunteered statement was silent on the question as to how Valenti might know the witness, and did not necessarily imply that Valenti knew him as an agent of the Alcohol Tax Unit by reason of previous liquor law violations. Clearly, there was no error here, and the majority below thought the point did "not seem at all important" (R. II, 249). Cf. *Hagans* v. *United States,* 170 F. 2d 141, 142 (C. A. 5) [volunteered statement by government witness, that he knew accused because he

had caught him several years before at a still, not error when evidence withdrawn on objection]; *Adams* v. *United States,* 156 F. 2d 271, 274 (C. A. 5), affirmed, 330 U. S. 801.

The second incident occurred later on in the examination of the witness Ginanatasio, and is printed in the margin.[15] Despite petitioners' contention that the witness' volunteered statement was not inadvertent but deliberate, it is significant that the trial judge quite properly did not regard it as such, but as an unwitting and innocuous remark. During the colloquy on the oral argu-

[15] Q. And when you seized the Plymouth black sedan from Mr. Giallo, he told you, to all your questions, directly that he didn't know anything about it and had never been to West Shokan, is that right? A. That is right. I also told him the reason I wasn't arresting him was because he was out on bail——

Mr. CHAPMAN. I am going to move for a mistrial if we have any more of the voluntary statements, your Honor.

The COURT. Mr. Chapman, don't address the Court that way.

Mr. CHAPMAN. No. I, naturally——

The COURT. Don't address the Court that way.

Mr. CHAPMAN. I wasn't addressing your Honor in any way, but you can understand my rancor.

The COURT. Mr. Ginanatasio——

The WITNESS. Yes, sir?

The COURT. —— don't make any statements of that nature again.

Stricken from the record and the jury are instructed to disregard them and erase them from their minds.

Go ahead. Next question.

Mr. CHAPMAN. I think, for the record, I ought to move for a mistrial because the witness has twice volunteered

ment on the motions to set aside the verdict, the judge stated (R. I, 147):

> While a statement of this nature if made by the prosecutor might have justified the withdrawal of a juror and the declaration of a mistrial, a similar statement unwittingly made by a layman, who is testifying during the course of cross-examination, does not warrant the same action from the Court, particularly so where the remark is more or less of an innocuous nature.
>
> There is no statement here as to the details under which he [Giallo] was out on

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statements not responsive to any questions, and serving to prejudice my client.

The COURT. I don't regard that as prejudicial.

Mr. CHAPMAN. Your Honor will overrule it?

The COURT. The jury will erase anything from their minds that I have stricken from the record.

Mr. CHAPMAN. That is a very, sometimes, a very hard thing to do.

The COURT. We will ask the jurors now.

Do any of you feel you cannot erase that from your mind, or any of you feel that that remark which I have ordered stricken from the record would prejudice you in any way in the fair consideration of the guilt or innocence of any of these defendants?

The jury have all indicated in the negative. Your motion is denied.

Mr. CHAPMAN. Exception.

By Mr. CHAPMAN:

As a matter of fact, Mr. Giallo and Mr. Valenti were not arrested in this case until some time in the spring of 1951, is that right? A. After the indictment was handed down.

Mr. CHAPMAN. Can you give us the date of that, Mr. Schaefer?

The COURT. March 29, 1951.

Mr. CHAPMAN. That is right. [R. I, 49–51.]

> bail; there is no statement here by this witness of the nature of the charge on which he was out on bail; there is no statement here of the witness of any conviction, no statement even of an arrest on a criminal charge. The bail might have been posted in some civil matter where a body execution has been issued or other things. It is innocuous.

The jury might very well have inferred from Ginanatasio's remark that Giallo was out on bail for the same crime for which he was being tried, and that clearly would not have been prejudicial. Moreover, as the majority opinion below observes, Giallo's "own attorney increased any likelihood of harm by making it appear of record that he was not arrested on that indictment until March 29, 1951 [about one year after the occurrence in the testimony], and in this way made it known to the jury that he had been accused of some offense other than that for which he was being tried" (R. II, 251).

These incidents are a good illustration of the manner in which petitioners endeavor by exaggeration to build up a charge of prejudicial misconduct. The rebuke to counsel was no stronger than the rebuke to the witness. The ensuing colloquy was occasioned by counsel's attempt to make a big issue of a minor matter. It is, we submit, clear that the judge acted within his sound discretion in denying the motion for a mistrial

after carefully instructing the jury to disregard the voluntary statements of the witness."[18]

In the federal courts the rule is recognized that the question of discharging a jury before verdict or granting a mistrial is a matter resting within the sound discretion of the trial judge. *United States* v. *Perez*, 9 Wheat. 579, 580; *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263, 298. The burden is upon the accused moving for a mistrial to show the reasonable possibility of prejudice and that the trial judge's discretion has been abused. *United States* v. *Stoehr*, 196 F. 2d 276, 283 (C. A. 3), certiorari denied, 344 U. S. 826; *United States* v. *Potash*, 118 F. 2d 54, 56 (C. A. 2), certiorari denied, 313 U. S. 584. Petitioners did not sustain that burden here.

An analogous situation was involved in *United States* v. *Curzio*, 179 F. 2d 380 (C. A. 3), where a government witness on cross-examination in a non-responsive answer mentioned the accused's police photograph, a motion for withdrawal of a juror was denied, and the court instructed the jury to disregard the answer. The language used is apropos in the instant case (179 F. 2d at 381):

> Our own examination of the record reveals no indication that the District

[18] In his final charge to the jury the judge instructed: "You will also disregard all testimony and exhibits which have been stricken from the record; they weren't evidence" (App., p. 39).

> Judge abused his discretion in denying the motion for a mistrial. He acted immediately, affirmatively and without fuss in disposing of what was, under the circumstances, a minor problem. He had seen and heard the entire episode. He was not impressed with the contention that the witness had deliberately tried to inject improper testimony into the trial.

In *United States* v. *Salli,* 115 F. 2d 292, 294 (C. A. 2), where the trial judge had ordered a volunteered statement by a government witness stricken out, Judge Learned Hand was of the opinion that "certainly [the trial judge] was not bound to declare a mistrial, the statement added very little to what was already in evidence." See also *United States* v. *Kushner,* 135 F. 2d 668, 674 (C. A. 2), certiorari denied, 320 U. S. 212; *Marsh* v. *United States,* 82 F. 2d 703 (C. A. 3); *Hilliard* v. *United States,* 121 F. 2d 992, 998–999 (C. A. 4), certiorari denied, 314 U. S. 627; *Claunch* v. *United States,* 155 F. 2d 261, 263 (C. A. 5); *Cavness* v. *United States,* 187 F. 2d 719, 722 (C. A. 9), certiorari denied, 341 U. S. 951.

CONCLUSION

It is therefore respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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comments are not, in your judgment, justified by the evidence, you may disregard the comments. You should also disregard and put aside all remarks addressed to your passion, your prejudice or your sympathy. This courtroom must be regarded by you as a forum of justice and you, as jurors, must endeavor to render a just and fair verdict in so far as it is humanly possible.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1953

No. 347. GIALLO ET AL. *v.* UNITED STATES. Certiorari, 346 U. S. 871, to the United States Court of Appeals for the Second Circuit. Argued January 8, 1954. Decided January 11, 1954. *Per Curiam:* Judgment affirmed. *Henry K. Chapman* argued the cause and filed a brief for petitioners. *John F. Davis* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack*. Reported below: 206 F. 2d 207.